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Process Preemption In Federal Siting Regimes

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Land use regulation has historically been a function of local governments. Congress left land use to the states; the states, in turn, empowered municipalities to enact zoning laws to guide planning and development decisions. Today, however, formal distinctions between state and federal spheres of power have been supplanted by an interjurisdictional understanding of federalism, in which local authority to regulate land overlaps with federal and state authority. Accordingly, Congress has experimented with a variety of policies aimed at compelling local governments to site nationally relevant facilities. Federal siting regimes have ranged from federal delegation of regulatory authority to the states, on one end of the spectrum, to unitary federal preemption of state control, vesting exclusive siting authority in a federal administrative agency, on the other.

This Article advances a more balanced approach to facilities siting termed “Process Preemption.” In a Process Preemption regime, Congress imposes federal constraints on the siting process, but leaves primary decisionmaking power in the hands of local regulators. This Article argues that Process Preemption has the potential to further the effectiveness of federal land use policies because (a) its hybrid federal-local framework accounts for the interjurisdictional nature of a federal siting policy, effectively balancing national and local land use priorities, and (b) its emphasis on procedure increases the legitimacy, consistency, and ultimate public acceptance of controversial siting decisions.

I. INTRODUCTION

Historically, land use regulation has been considered a matter of local concern. The federal government left land use to the states; the states, in turn, empowered municipalities to enact zoning laws to guide planning and development decisions.1 Today, however, formal distinctions between state and federal spheres of power have been supplanted by an interjurisdictional understanding of federalism, in which local authority to regulate land over-
laps with federal and state authority. Indeed, modern land use law involves a significant federal dimension, resulting in part from the enactment of a number of key federal statutes that have varying degrees of preemptive effect on local authority.

This Article identifies an innovative framework for ordering federal-local interactions in land use law that was first articulated by Congress in the Telecommunications Act of 1996 ("TCA"). This framework empowers local governments to make primary siting decisions, subject to federal constraints on the decisionmaking process. Because this hybrid approach imposes substantive and procedural constraints on the local land use process, this Article terms it "Process Preemption." By respecting the traditional division of powers in land use law, Process Preemption accounts for the interjurisdictional nature of federal policies that impact local land use. Moreover, in authorizing local implementation of a national program, Process Preemption encourages diversity within a federal framework and achieves a delicate and effective balance of federal and local interests in land use law.

In contrast, federal preemption regimes that place siting authority entirely within one level of government miss this interjurisdictional dynamic.

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3 Federal constitutional authority to enact policies that impact land use stems from a number of enumerated powers, including the power to regulate interstate commerce, the taxing and spending power, and the Fourteenth Amendment. John R. Nolon, Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control, 23 Pace Envtl. L. Rev. 821, 826-29 (2006).


6 Process Preemption is a form of conflict preemption by which state and local regulations that conflict with federal siting standards are preempted. See Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (defining conflict preemption and listing general categories of preemption); see also Verchick & Mendelson, supra note 2, at 21-22 (describing the forms of preemption, including express, conflict, obstacle, and field).

7 Interjurisdictional regulatory problems often arise when federal regulation of a national interest overlaps with the core local authority to regulate local land use or when the traditionally local police power obligation to protect local health and safety overlaps with the national interest in protecting national infrastructure and regulating interstate effects. Erin Ryan, Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area, 66 Md. L. Rev. 503, 567-68, 573 (2007). This tension, which can generate regulatory gaps for interjurisdictional problems like urban sprawl and global warming, has been termed the "regulatory commons problem." See, e.g., William W. Buzbee, Recognizing the Regulatory Commons: A Theory of Regulatory Gaps, 89 Iowa L. Rev. 1, 5 n.5 (2003).
and often fail to achieve federal land use goals. Aggressive federal preemption regimes that exclude local decisionmakers from the siting process fail because local opposition, in contrast to local authority, cannot be preempted.\(^8\)

At the same time, federal siting regimes that permit states to exclusively empower local decisionmakers also fail to achieve federal goals. Particularly with regard to unpopular land use decisions, locally elected officials tend to focus on the well being of their own residents to the exclusion (and detriment) of outsiders.\(^9\) In the absence of countervailing federal or state policy, there is no mechanism through which to compel local decisionmakers to consider regional or federal interests in their decisionmaking process.\(^10\) Localities are therefore free to shape their communities, permitting those land uses deemed desirable and excluding others.

This Article develops a theory of Process Preemption through a comparison of federal statutes regulating the siting of nationally significant, but locally undesirable, facilities. In the 1980s, Congress adopted two diametrically opposed strategies for siting radioactive waste disposal facilities (collectively, the "Waste Siting Policies"). For high-level radioactive waste,\(^11\) Congress adopted an aggressively preemptive approach, expressly designating federally owned property at Yucca Mountain, Nevada as the site for a single national high-level waste facility.\(^12\) Though the site was chosen in 1988 and formally approved by Congress and the President in 2002, it was

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\(^10\) See infra notes 49–56.


met with continuous legal and political challenges and was ultimately abandoned in 2009.  

For low-level radioactive waste ("LLW"), Congress expressly empowered states to site disposal facilities, individually or through interstate compacts, with limited federal interference. Despite the fact that the states supported the Low Level Radioactive Waste Policy Act of 1980 and its 1985 Amendments (collectively, the "LLW Act"), the Act is widely regarded as a failure. In the decades since the LLW Act was passed, not one additional LLW disposal facility has been sited pursuant to the interstate compacts authorized by the Act despite numerous siting attempts.

In contrast to the Waste Siting Policies, the TCA's siting policy ("Telecommunications Siting Policy") adopts a more balanced interjurisdictional


\[\text{Low-level waste includes items that have become contaminated with radioactive material, including protective shoe covers and clothing, wiping rags, equipment and tools, luminous dials, swabs, syringes, and laboratory animal carcasses. Low Level Waste, U.S. NUCLEAR REGULATORY COMM'N, http://www.nrc.gov/wastellow-level-waste.html (last updated Feb. 13, 2007).}

\[\text{For further discussion, see infra Part IV.A.2.}


approach that leaves primary siting authority in the hands of local regulators, but places explicit substantive and procedural constraints on the decision-making process. In effect, the Telecommunications Siting Policy preempts the siting process, without disempowering local governments.\textsuperscript{20} Overall, the TCA's Process Preemption regime has succeeded in achieving its federal land use goals. Since the Act was passed, the number of cell towers sited across the country has increased dramatically, contributing to the development of a national telecommunications network.\textsuperscript{21} Moreover, the TCA's hybrid federal-local framework has encouraged local regulators to cooperate with land use developers.\textsuperscript{22}

Admittedly, it is difficult to draw generalized conclusions from a comparison of these siting regimes because radioactive waste disposal facilities are fundamentally different from cell phone towers. Indeed, this Article readily concedes that Process Preemption alone is not likely to overcome the entrenched local opposition to centralized radioactive waste disposal facilities.\textsuperscript{23}

Notwithstanding this limitation, this Article argues that the TCA's Process Preemption approach has two distinct advantages over the earlier Waste Siting Policies. First, Process Preemption's hybrid federal-local framework accounts for the interjurisdictional nature of a federal siting policy, effectively balancing national and local land use priorities. Second, by placing procedural constraints on the local decision-making process—including the requirement that decisions be made within a reasonable period of time, supported by substantial evidence contained in a written record, and subject to federal judicial review—Process Preemption increases the legitimacy, consistency, and public acceptance of controversial siting decisions.

The Article proceeds as follows. Part II explains why local governments have historically been empowered to regulate the use and development of land and analyzes the impact of federal preemption on local authority. Part III situates preemptive federal siting policies within the wider

\textsuperscript{20} In particular, the Telecommunications Siting Policy contains both floor preemption provisions, which preempt local decisions that are inconsistent with or fail to meet the minimum federal procedural requirements, as well as ceiling preemption provisions, which preempt local decisions that are more restrictive than the federal standard. See William W. Buzbee, Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction, 82 N.Y.U. L. Rev. 1547, 1553–54, 1573–75 (2007).

\textsuperscript{21} Since the passage of the act, the number of cell towers has increased from under 20,000 in 1995 to over 250,000 in 2010. Wireless Quick Facts, CTIA: THE WIRELESS ASSOCIATION, http://www.ctia.org/advocacy/research/index.cfm/AID/10323 (last visited Mar. 5, 2011); see also T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County/Kansas City, 546 F.3d 1299, 1306 (10th Cir. 2008) (noting that the TCA has furthered federal telecommunications goals "by reducing the impediments that local governments could impose to defeat or delay the installation of wireless communications facilities such as cell phone towers, and by protecting against "irrational or substanceless decisions by local authorities"").

\textsuperscript{22} John Copeland Nagle, Cell Phone Towers as Visual Pollution, 23 Notre Dame J.L. Ethics & Pub. Pol'y 537, 564 (2009) (noting that the siting policy encourages cooperation between cellular companies and local communities).

\textsuperscript{23} See infra Part V.C.
debate over federal preemption, highlighting the advantages of a national land use policy that leaves ample room for local tailoring and diversity. Part IV analyzes three federal siting regimes that run the gamut from complete preemption to complete delegation. On the basis of this analysis, Part V argues that Process Preemption, an interjurisdictional approach that utilizes a mix of federal and local regulatory actors, has the potential to aid policymakers in addressing a variety of siting conflicts, including those currently arising in connection with the development of alternative and renewable energy sources.

II. OF FEDERAL LAW AND LOCAL LAND

Land use has long been considered the mainstay of local government power. From its humble beginning as a way for urban municipalities to prevent overcrowding and segregate incompatible uses, to its current concern with aesthetics and “smart growth,” zoning is the primary method through which local communities regulate development and express community preferences and character. Local officials, both part of and accountable to the local community, are generally thought to be in the best position to respond to community land use preferences. As the New Jersey Supreme Court noted in an early zoning case, “local officials who are thoroughly familiar with their community’s characteristics and interests and are the proper representatives of its people are undoubtedly the best equipped to pass initially on [zoning requests].”

This Part explores the relationship between federal preemption and local land use law. Section A explains why land use regulation has historically been delegated to local governments. Section B analyzes the way in which federal preemption of local land use laws impacts the local planning and zoning process.

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24 Despite national support, alternative and renewable energy projects often face intense opposition at the local level. Sara C. Bronin, Curbing Energy Sprawl with Microgrids, 43 CONN. L. REV. 547, 571–72 (2011) (describing local opposition to renewable and alternative energy projects, including wind and solar installations); Christopher M. Crane, State Authority in Siting of Liquefied Natural Gas Import Terminals, 14 BUFF. ENVT'L. L.J. 1, 5–8 (2006) (describing public opposition to liquefied natural gas (“LNG”) siting); see also infra Part V.C.


Federal preemption of property rights stands in direct contrast to a long history of empowering local governments to regulate land use.\(^{28}\) From its inception, zoning has provided a means for local communities to address urban problems and coordinate growth.\(^{29}\) Early land use ordinances were limited in scope, focusing on fire prevention and building standards,\(^{30}\) or on restricting noxious uses from residential neighborhoods.\(^{31}\) By the end of the 19th century, however, municipalities became increasingly concerned about the general compatibility of land uses within their borders.\(^{32}\) By separating residential districts from commercial and industrial areas, early city planners hoped to stabilize neighborhoods and protect property values.\(^{33}\)

In 1916, New York City adopted a widely publicized comprehensive zoning ordinance, prompting then-Secretary of Commerce Herbert Hoover to establish a committee to study zoning.\(^{34}\) In 1922, the zoning committee promulgated the Standard State Zone Enabling Act ("SZEA")\(^{35}\) to aid states in authorizing municipalities to adopt zoning ordinances. In the landmark 1926 case of *Village of Euclid v. Ambler Realty Co.*,\(^{36}\) the Supreme Court


\(^{31}\) See, e.g., *In re Hang Kie*, 10 P. 327 (Cal. 1886) (ordinance restricting operation of laundries); Shea v. City of Muncie, 46 N.E. 138 (Ind. 1897) (ordinance restricting operation of taverns and liquor stores); Cronin v. People, 82 N.Y. 318 (1880) (ordinance restricting operation of slaughterhouses).


\(^{33}\) Id. at 728 & n.43 (citing J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 762).


\(^{35}\) ADVISORY COMM. ON ZONING, U.S. DEPT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926).

\(^{36}\) 272 U.S. 365 (1926).
upheld the validity of zoning as a valid exercise of the police power. Recognizing the need to coordinate development in rapidly changing urban communities, the Court stated:

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities . . . . Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.

With the Supreme Court's approval, the practice of zoning spread rapidly. By 1930, thirty-five states had passed enabling acts authorizing localities to zone.

That local governments were primarily empowered to regulate land is not a historical accident. Rather, local primacy in this area of law stems from a practical recognition that local governments are institutionally better suited to this task than are higher levels of government. Local and county governments are often the only levels of government that have the capacity to discover and act on the preferences of local constituencies. The federal government lacks the detailed knowledge necessary for local land use planning and cannot possibly bear the aggregate cost of administering local land use policies. As the Ohio Supreme Court observed in upholding a local zoning ordinance, "it is better to leave the formulation and implementation of zoning policy to the city council, or other legislative body, which has not

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37 Id. at 389. The Court expressly noted that "the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions." Id.

38 Id. at 386–87.

39 ELLICKSON & BEEN, supra note 30, at 76; WOLF, supra note 9, at 121–34.

40 Buzbee, supra note 28, at 94; see also Nolon, supra note 3, at 853 (listing reasons for local control over land use including its long-standing history, variation in local economic markets and environments, capacity of local citizens and politicians to respond to local conditions, and ability to implement federal and state initiatives).

41 Buzbee, supra note 28, at 92; Marci A. Hamilton, Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act, 78 Ind. L.J. 311, 335 (2003) (noting that by "keeping land use law local, citizens have more direct access to their representative . . . and a proportionally larger voice in the land use process that directly affects them").

42 See John P. Dwyer, The Practice of Federalism Under the Clean Air Act, 54 Md. L. Rev. 1183, 1218 (1995) (arguing that only local governments have the detailed local knowledge and resources necessary to administer programs implicating land use); Philip J. Weiser, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act, 76 N.Y.U. L. Rev. 1692, 1699–1700 (2001) (same).
only the expertise and staff, but also, the constitutional responsibility to police this area effectively."

Moreover, land, by its nature, is inherently local. It exists within definite metes and bounds and cannot be moved. As a result, its uses often have a greater impact on those living nearby than on those living far away. For example, a decision to site a telecommunications tower or hazardous waste facility in one community has a significantly greater impact on the aesthetics, property values, health and safety, and character of the sited community than on other communities. Similarly, collective decisions regarding the permissible uses of land, such as whether to permit a church in a commercial district or whether to permit homes to be painted pink, are an essential part of how communities develop their character and pursue common goals. Thus, local officials, who are a part of the community and are accountable to it, are often in the best position to guide the use and development of land.

B. How Federal Preemption Alters Local Land Use

Federal preemption of local land use regulation has two direct and interrelated effects on local governments. First, federal preemption of land use regulations compels local authorities to consider national interests in their decision-making process. Second, federal preemption subsidizes the land use promoted under the federal scheme by reducing (or eliminating) the costs associated with obtaining local land use permits. To illustrate, the federal Fair Housing Act ("FHA") has been interpreted to require local governments to modify their zoning codes to accommodate group homes for handicapped individuals. The Fair Housing Act thus (1) compels local governments to consider the federal interest in assuring adequate housing for

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43 Leslie v. City of Toledo, 423 N.E.2d 123, 125 (Ohio 1981); see also Oak Park Trust & Sav. Bank v. City of Chicago, 438 N.E.2d 630, 635 (Ill. App. Ct. 1982) ("It is within the province of the local municipal body to determine the uses of property and establish zoning classifications.").

44 Dwyer, supra note 42, at 1218 (describing intense conflict over land use at local level because burdens of use are felt most directly by those living near the land); Hamilton, supra note 41, at 335 (noting that land use decisions are primarily local because they have a greater impact on those living near the land); cf. Eduardo M. Peñalver, Land Virtues, 94 Cornell L. Rev. 821, 828–32 (2009) (emphasizing the psychological attachments to land that develop in connection with the local activities conducted on the land).

45 Indeed, some studies have demonstrated a correlation between declining property values and the proximity of the home to a waste disposal facility. See Gerrard, supra note 17, at 1109–10.

46 Hamilton, supra note 41, at 335.

handicapped persons and (2) creates a subsidy for handicapped persons by eliminating, or reducing, the need for such persons to obtain zoning related permits. In enacting a statute that constrains local zoning discretion, Congress, in effect, determines that the protected land use is deserving of a subsidy and that the national interest in the protected land use should be weighed against the local interest in regulating development.

1. Mandating Local Consideration of Extra-Local Concerns

Critics of local land use have long worried about local governments’ tendency to focus exclusively on the well-being of its own residents, often to the detriment of outsiders. Modern scholars have expressed concern that local regulatory decisions in a variety of substantive areas “have external effects on neighboring communities, shaping regional economies without any imperative that the extraterritorial consequences of local decision-making be taken into account.”

Reliance on local government to regulate land use has been blamed for a variety of social problems, including urban sprawl, environmental injustice, racial segregation, lack of affordable housing, and conflicting land uses at municipal borders. Indeed, the capacity for local decision-makers to respond to community preferences, often touted as a democratic benefit of local land use regulation, creates a double-edged sword: in many contexts, community preferences conflict with broader regional and national needs. For example, a community might resist siting a low-income housing development or sewer treatment plant despite a recognized regional need.

Local resistance to unpopular developments is a well-known phenomenon, commonly shorthanded as “NIMBY,” an acronym for Not In My Backyard. NIMBYs object to further development within their communities, fearing that such development might reduce the market value of their

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49 Nestor M. Davidson, Cooperative Localism: Federal-Local Cooperation in an Era of State Sovereignty, 93 VA. L. REV. 959, 1024 (2007); see also Herbert Wechsler, Foreword to MODEL LAND DEV. CODE X (Am. Law Inst. 1976) (noting that the SZE, “when it is applied by local governments within a region, tends to disregard the greater interests of the regional community and in many instances fails to recognize and protect valid local needs”).

50 Craig Anthony (Tony) Arnold, The Structure of the Land Use Regulatory System in the United States, 22 J. LAND USE & ENVTNL. L. 441, 442-43 (2007); see also Wolf, supra note 9, at 147-48 (noting that zoning law insulates “local, self-interested efforts” to exclude beneficial facilities from legal challenge).


homes or change the character of the community. NIMBYism presents a challenge to social and political programs that require local government cooperation. According to William Fischel:

NIMBYs show up at the zoning and planning board reviews, to which almost all developers of more-than-minor subdivisions must submit. If NIMBYs fail to reduce the scale and density of the project at these reviews, they often deploy alternative regulatory rationales, such as environmental impact statements, historic districts, aboriginal burial sites, agricultural preservation, wetlands, flood plains, access for the disabled and protection of (often unidentified) endangered species at other local, state and federal government forums, including courts of law . . . . And if NIMBYs fail in these efforts, they seek, often by direct democratic initiatives, to have the local zoning and planning regulations changed to make sure that similar developments do not happen again.

NIMBYism results from the local political market's failure to account for the external impacts of local zoning decisions. Though a region may desperately need additional low-income housing, the individuals who would benefit from such housing are largely absent from the local jurisdiction and unable to participate in the decisionmaking process. Traditional land use law provides no mechanism through which to force local governments to consider these external or underrepresented interests. According to Thomas Merrill:

NIMBY presents a classic prisoners dilemma. Everyone has an incentive to export the costs of an activity (such as a locally undesirable land use), but if everyone pursues this strategy, the benefits of the activity are lost to all. Federal regulation that permits weighing the costs and benefits of the activity in question as part of an overall strategy seems to be a logical response.
To that end, federal regulation that preempts or constrains the siting process creates the legal mechanism necessary to compel local governments to weigh national interests against local concerns in siting decisions.58

2. Federal Subsidization of Protected Land Use

Federal preemption that eliminates or reduces the ability of local authorities to bargain over zoning restrictions provides a significant political and economic benefit to the land use developer, thereby subsidizing the protected land use.59 In many localities, land use developers must negotiate with the local community to secure homeowner approval.60 Federal preemption of local zoning requirements dramatically alters the dynamic between community and developer:

Removing a zoning restriction from a piece of land ordinarily provides a financial benefit to the property owner. Every developer knows that securing the consent of local officials to a project with hostile neighbors is an arduous, expensive process that often requires community compensation, reductions in project size, and changes in design.61

In addition, where federal preemption serves to override concerns regarding facilities siting, it forces the local community to absorb the “psychic costs” of the land use.62 In other words, if developers do not internalize the negative externalities of siting undesirable land uses, then the neighbors are, in effect, subsidizing the use.63 Since federal preemption provides a significant subsidy for the targeted land use and interferes with a deeply local function, the decision to preempt and the degree of preemption must be carefully considered. The next Part provides context for this consideration by situating federal preemption of local land use authority within the broader preemption debate.


58 See infra notes 100-103 (describing the use of federal regulation in the environmental context to force state and local actors to internalize the costs of their decisions).

59 See Gerrard, supra note 17, at 1108; Serkin, supra note 9, at 1652.

60 Serkin, supra note 9, at 1652 (“Whether through bribes or extortion—exactions or threats to leave—special interest groups must still secure local homeowner approval or they will not find a responsive local government.”).

61 Gerrard, supra note 17, at 1108.

62 Robert A. Bohrer, Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress, 1984 Wis. L. Rev. 83, 111 (1984) (noting that denial of damages for emotional distress related to facilities siting represents a deliberate choice to subsidize the facility rather than require the developer to internalize the “psychic costs” of the facility).

63 Gerrard, supra note 17, at 1109 (describing economic subsidy in the context of hazardous waste facilities siting).
III. PERSPECTIVES ON PREEMPTION IN LAND USE

So long as it is regulating within the scope of its constitutionally enumerated powers, Congress has broad authority under the Supremacy Clause to preempt state and local laws. In a number of substantive areas, Congress has emphatically asserted its authority to enact uniform national policies and regulations. For example, federal civil rights statutes prohibit discrimination in employment and housing and broadly preempt less protective state and local laws. The Fair Labor Standards Act establishes a national minimum wage, preempting state laws that set a lower minimum wage or that have no minimum wage at all. Similarly, the Employee Retirement Income Security Act ("ERISA") establishes national standards for most pension and health plans in private industry and entirely preempts similar state laws.

As the Supreme Court's federalism opinions emphasize, however, there are a number of compelling normative reasons for Congress to wield its preemptive power cautiously. In the words of the Court, federalism:

assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Thus, the underlying policy choice in preemption involves weighing the advantages of uniformity against the benefits of decentralization. In many substantive areas, Congress seeks to split the difference, adopting what have

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64 Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983) ("It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms.").


been variously termed "interactive,"72 "dynamic,"73 "iterative,"74 "diagonal,"75 or most generically, "cooperative"76 regimes that engage multiple, overlapping levels of government to promote diversity within a federalist framework.77

Typically, cooperative federalist statutes outline the contours of a regulatory program, encouraging states to implement the program in accordance with federal guidelines.78 Such programs involve varying combinations of preemption, collaboration, and fiscal incentives to involve state governments in the regulatory process.79 For example, cooperative federalist statutes often include both carrots and sticks: the promise of federal financial assistance for states that comply, and the threat of more intrusive federal preemption should states fail to do so.80 Within the cooperative federalist framework, states are authorized to experiment with implementation techniques and tailor their individual programs to accommodate local conditions and preferences.81 Cooperative federalism thus seeks a functional compromise between federal preemption and federal delegation, preserving the primacy of the fed-

72 E.g., Schapiro, supra note 2; William W. Buzbee, Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons, 57 EMORY L J. 145, 146 (2007) (noting that Congress and agencies prefer regulatory overlap and interaction, "harnessing the strengths of state and federal institutional actors and forcing the two to interact").


76 Weiser, supra note 42, at 1696; Dwyer, supra note 42, at 1197–99; Davidson, supra note 49, at 967–68.

77 Davidson, supra note 49, at 967–68 (noting that cooperative federalism balances uniformity and diversity); Weiser, supra note 42, at 1695 (noting that in enacting cooperative federalism regimes "Congress opts for the benefits of diversity in regulatory policy within a federal framework").


79 Adler, supra note 78, at 384 (describing use of financial assistance to induce states to participate in cooperative schemes); Davidson, supra note 49, at 966–67 & n.15 (describing range of federal-state regulatory options, including preemption, collaboration, and absence of federal involvement).

80 As Professor Adler explains:

State programs that meet federal standards are typically eligible for federal financial assistance. States that fail to adopt adequate programs are not only denied the relevant federal funding, they can also be subject to various sanctions and federal preemption of their programs. That is, if states refuse to regulate in accordance with federal guidelines, the federal government may regulate in their place.

Adler, supra note 78, at 384.

81 Id.; Weiser, supra note 42, 1697–98 & n.23 (noting that federal programs promote diversity in order to allow states to tailor federal policies to local conditions).
eral government to set national priorities and standards without sacrificing the benefits of diversity achieved through decentralization.82

A. The Benefits of Decentralization in Land Use Law

Decentralization allows states to tailor regulatory responses to accommodate varying geographic and economic conditions and community preferences.83 The ability to tailor regulation to local conditions is vitally important for land use because the substantive content of "good" land use law varies by locale:

[T]he legal framework of rules, policies, and incentives to influence "good" land use practices is informed by the geographical context of the physical and socioeconomic systems in which land use operates. In other words, the effectiveness and validity of legal measures to control harmful externalities depend upon [an] understanding of the geographical context in which such effects arise.84

Thus, the "reasonableness" of a particular zoning decision depends upon the desired city form and social make up of the area.85 Given the tremendous diversity between, and even within local jurisdictions, federal preemption that creates uniform land use standards may result in policies that fit poorly with local conditions.86

In addition, citizen participation in policymaking, which is presumably easier at the state and local levels,87 facilitates local tailoring by increasing governmental responsiveness to the needs and preferences of the local community. In other words, "the smaller the polity in geography and in population, the easier it is for the people (1) to monitor what their government is doing, (2) to criticize or praise, and therefore (3) to affect public policy."88

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82 Davidson, supra note 49, at 967-68.
83 Id. at 1006-07; see also Benjamin K. Sovacool, The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change, 27 STAN. ENVTL. L. J. 397, 432 (2008).
85 Mandelker & Tarlock, supra note 55, at 10 (further noting that there are no "transcendent zoning values" that apply to all land use decisions).
86 Karol Ceplo & Bruce Yandle, Western States and Environmental Federalism: An Examination of Institutional Viability, in ENVIRONMENTAL FEDERALISM 225, 225-26 (Terry L. Anderson & Peter J. Hill eds., 1997) ("There is recognition that homogenous solutions applied to heterogeneous problems often yield high costs and weak results."); Jonathan H. Adler, Jurisdictional Mismatch in Environmental Federalism, 14 N.Y.U. ENVTL. L.J. 130, 136-37 (2005) ("The failure to take into account local environmental conditions—let alone local tastes, preferences, and economic conditions—leads to 'one size fits all' policies that fit few areas well, if at all.").
87 See Davidson, supra note 49, at 1008; Gerald E. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1057, 1069 (1980) (noting that limited size is required for individual participation in political life).
88 Hamilton, supra note 41, at 321.
In contrast, both Congress, which enacts preemption statutes, and the federal courts, which interpret such statutes, "are remote from average citizens and lack effective, low-cost channels through which citizens can communicate and implement their views."\(^{89}\)

Moreover, novel state and local environmental and land use laws often serve as a catalyst for further government action, encouraging regulation in areas that otherwise would not be addressed.\(^{90}\) For example, California famously adopted standards governing automobile emissions, leading to the adoption of a federal vehicles emissions standard.\(^{91}\) New York similarly has been credited with initiating a states-wide trend in offering tax incentives for environmentally conscious "green building."\(^{92}\) More recently, state and local initiatives in the area of climate change have prompted the federal government to consider federal climate change regulations,\(^{93}\) as well as a national renewable portfolio standard.\(^{94}\)


\(^{90}\) See Roderick M. Hills, Jr., Against Preemption: How Federalism Can Improve the National Legislative Process, 82 N.Y.U. L. REV. 1, 19–22 (2007) (describing key role of state and local politicians as "natural policy entrepreneurs who can significantly influence what sorts of conditions are publicly recognized as problems"); Kirsten Engel, State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?, 38 URB. L. REV. 1015, 1026 (2006) (noting that "[e]nvironmental law is replete with examples where state regulatory initiatives on a given issue have succeeded in prompting a federal regulatory response.").

\(^{91}\) Jonathan H. Adler, The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection, 55 CASE W. RES. L. REV. 93, 102–03 (2004); Ryan, supra note 7, at 617.


\(^{93}\) See Matthew L. Wald, E.P.A. Moving on Greenhouse Gases, N.Y. TIMES, Dec. 24, 2010, at A16 (describing EPA’s proposed regulation of greenhouse gas emissions despite opposition in Congress); J. Kevin Healy & Jeffrey M. Tapick, Climate Change: It’s Not Just a Policy Issue for Corporate Counsel—It’s a Legal Problem, 29 COLUM. J. ENVTL. L. 89, 98–100 (2004) (noting state initiatives on climate change include urging the federal government to address the issue); cf. Engel, supra note 90, at 1026 (noting that "the long-term significance of state and local action on climate change may lie in its impact in triggering action at higher levels of government, such as at the national level or even within the international arena").

\(^{94}\) Renewable Portfolio Standards ("RPS") have been adopted in many states to require public utilities to generate increasing percentages of electricity from renewable sources. Bronin, supra note 24, at 577; see also Lincoln L. Davies, Power Forward: The Argument for a National RPS, 42 CONN. L. REV. 1339, 1341 (2010) (noting that over twenty-five proposals for a national RPS have been introduced in the federal legislature); Salkin & Ostrow, supra note 53, at 1050–51 (describing proposed federal renewable portfolio standard).
Decentralization thus enables states to serve as "laboratories of democracy."\(^9\) In contrast, federal preemption prevents states from experimenting with novel social and economic strategies.\(^9\) Moreover, preemptive federal standards can lock in suboptimal regulatory choices by eliminating the incentives and ability of sub-national actors to seek change. Along these lines, William Buzbee has argued:

With complete displacement, especially if common law venues are preempted, no actor or institution outside the federal regulatory venue has any room or incentive to criticize and seek change. Change will likely occur only if the preempting federal actor—be it an administrative agency or the legislature—decides to change its previous decision.\(^9\)

Instead, better regulatory policy may be achieved if local regulators are given the flexibility and discretion to experiment with a variety of standards before a single national standard is selected.\(^9\)

**B. The Benefits of National Uniformity in Land Use Law**

Despite the many benefits of decentralization, for some land use problems, national uniformity through preemptive federal statutes is desirable. As Steven G. Calabresi observes, "[s]ometimes variety is not the spice of life; as to some items it may be a downright nuisance and an expensive one at that. National government eliminates these potential deadweight social costs with general gains in social utility as a result."\(^9\)

For example, a federal approach might be necessary to address a problem that crosses state boundaries. The most commonly cited example is environmental regulation, where, the argument goes, individual states have little incentive to consider the effects of their environmental policies on other states:

Consider a factory that dumps pollution in a rural Illinois river, making the river downstream, next to a populous Missouri town,
unswimmable and undrinkable. The upstream state government may not have a strong incentive to take into account the harm to downstream out-of-state residents—a "negative externality" from an in-state activity that generates jobs and tax revenues.\textsuperscript{100}

Some argue that addressing environmental spillovers in a decentralized system is virtually impossible.\textsuperscript{101} In cases of substantial interstate spillovers, only the federal government is able to compel states to absorb the costs of their activities.\textsuperscript{102} Along these lines, Thomas Merrill has argued that state laws should be presumptively preempted when a state is attempting to export a disproportionate share of the cost of environmental regulation to other states.\textsuperscript{103}

Similarly, the federal government, which is removed from local politics and NIMBY sentiment, may be in the best position to distribute the burdens of certain locally undesirable land uses across the nation. In his seminal work on hazardous waste facilities siting, Michael Gerrard emphasized the potential for the federal government to fairly allocate the burdens of waste disposal amongst the fifty states based upon the amount of waste they generate, their existing disposal capacity, and their geographic characteristics.\textsuperscript{104}

In contrast, state governments, perhaps because they are more responsive to local constituents, are less likely to adopt aggressive redistributive programs.\textsuperscript{105} Further devolving power to local governments seems to exacerbate the effect. As Richard Briffault has noted, "[c]ontemporary cities, as a rule, do not engage in innovative redistributive programs, not because they lack the legal authority, but rather because they fear that initiating such programs would cause residential and commercial taxpayers to depart."\textsuperscript{106} Thus,

\textsuperscript{100} Verchick & Mendelson, supra note 2, at 18; see also Glicksman & Levy, supra note 57, at 593 (arguing that federal environmental regulation is most justified when collective action problems create incentives for states acting individually to regulate in ways that are contrary to the interests of the states as a collective).


\textsuperscript{102} See Kirsten H. Engel, State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?, 48 Hastings L.J. 271 (1997) (arguing that without federal regulation, states would engage in a "race to the bottom" by relaxing environmental standards to attract industry, contrary to the national interest); Richard J. Pierce, Jr., Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation, 46 U. Pitt. L. Rev. 607, 670 (1985) (arguing that states should not be permitted to make regulatory decisions that create substantial interstate spillovers).

\textsuperscript{103} Merrill, supra note 57, at 175.

\textsuperscript{104} Gerrard, supra note 17, at 1205–06.

\textsuperscript{105} See Sheryll D. Cashin, Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities, 99 Colum. L. Rev. 552, 594–95 (1999) (observing that the national government has historically been far more interventionist on behalf of both the poor and racial minorities than have state governments).

\textsuperscript{106} Briffault, supra note 9, at 408; see also Cashin, supra note 105, at 594–95.
the federal government is often in the best position to make fundamental policy choices about redistribution.\textsuperscript{107}

In addition, where a national market truly exists, the presence of state regulations that differ substantially from federal requirements and from each other hinders interstate commerce and the growth of the regulated industry.\textsuperscript{108} Uniformity helps industry and investors by providing a more "consistent and predictable statutory environment."\textsuperscript{109} In fact, federal preemption statutes are often enacted in response to industry lobbying seeking to displace an array of inconsistent regulatory requirements with a uniform federal standard.\textsuperscript{110}

In the land use context, local permitting processes create an array of inconsistent regulations that can impede the growth of national industries. Consider, for example, the Telecommunications Siting Policy, explored in greater detail in Part IV. In its report on the telecommunications law, the House Commerce Committee explained that diverse state and local siting requirements hindered the development of a national telecommunications network.\textsuperscript{111} According to the report:

\begin{quote}
[C]urrent State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) . . . The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible.\textsuperscript{112}
\end{quote}

The Telecommunications Siting Policy was thus established to increase regulatory consistency and predictability for telecommunications service providers so as to facilitate the growth of a national telecommunications network.

\textsuperscript{107} Cashin, \textit{supra} note 105, at 556 (noting that "voters show more willingness to accept redistributive spending at the national level"); \textit{see also} Paul E. Peterson, \textit{City Limits} 82–83 (1981) (supporting federal involvement in redistributive programs to improve equity).

\textsuperscript{108} Ann E. Carlson, \textit{Energy Efficiency and Federalism}, 107 Mich. L. Rev. First Impressions 63, 67 (2008) (noting that "eleven proponents of a strong state role in environmental policymaking advocate federal preemption for the regulation of products for which there is a national market, such as appliances"); Weiser, \textit{supra} note 42, at 1710–11 (highlighting the benefits of uniformity where a national market exists, as in the case of e-signatures).

\textsuperscript{109} Esty, \textit{supra} note 101, at 619; \textit{see also} Sovacool, \textit{supra} note 83, at 421–22.

\textsuperscript{110} Engel, \textit{supra} note 73, at 184–85; \textit{see also} Hills, \textit{supra} note 90, at 29–30 (noting that industry interest groups will often favor regulatory uniformity even when that uniformity results in more stringent controls); Hoke, \textit{supra} note 89, at 691–92 & n.27 (describing industry preference for federal preemption); Pietro S. Nivola, \textit{Does Federalism Have a Future?}, 142 Pub. Int., Winter 2001, at 44, 55 (noting that the federal motor-vehicle safety and emissions standards were enacted after "[t]he automobile industry lobbied to preempt the states from setting disparate standards, some of which might be overly militant.").


\textsuperscript{112} \textit{Id.}
Notwithstanding the historically local nature of land use law, the federal government has long played a role in shaping local development. Since the 1970s the federal government has been the primary regulator of environmental issues, with a significant impact on local land use policies. In addition, federal housing acts have long required local communities to engage in some form of land use planning as a condition to the receipt of federal housing and community development funds. Federal funding for urban housing and renewal programs has directly influenced the growth and development of urban areas. Federal transportation policies have facilitated suburbanization (and urban sprawl), while the federal mortgage interest deduction and property tax deductions for owner-occupied housing impacts local housing patterns and development. Federal agricultural policies promote land conservation by local authorities, and in many regions of the country, local land use policies are impacted by federal land holdings. In the civil rights context, federal laws including the Americans with


117 See Davidson, supra note 49, at 968 n.21; Green, supra note 29, at 81–84; U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-99-87, COMMUNITY DEVELOPMENT: EXTENT OF FEDERAL INFLUENCE ON “URBAN SPRAWL” IS UNCLEAR 2–4 (1999) (recognizing the federal role in patterns of local development).

118 See Davidson, supra note 49, at 968 n.21; Green, supra note 29, at 84–87.

119 See, e.g., Sodbuster Law, 16 U.S.C. § 3811 (2006) (requiring the implementation of conservation plans for certain land); Conservation Reserve Program, 16 U.S.C. §§ 590a, 3831 (1994) (authorizing contracts with eligible owners and operators of highly erodible cropland to assist in conserving and improving their soil and water resources); see also Green, supra note 29, at 99–102 (describing impact of federal agricultural policies on local land use).

Disabilities Act ("ADA") and the Fair Housing Act establish baseline standards of equality that constrain local zoning authority.

This Part examines several federal regulatory regimes aimed at siting nationally relevant facilities. Section A analyzes the federal approach to siting radioactive waste disposal facilities. Federal siting regimes have run the gamut from aggressive unitary preemption, in the case of high-level waste, to complete delegation to state authority, in the case of low-level waste. Both regimes, however, have dramatically failed to achieve national land use goals.

Section B examines the "Process Preemption" siting regime established by the Telecommunications Siting Policy. The Telecommunications Siting Policy leaves primary siting authority in the hands of local regulators, but places explicit substantive and procedural constraints on the decision-making process. Though litigation continues regarding the interpretation of the Act, the Telecommunications Siting Policy has succeeded in facilitating cell phone tower siting, enabling the rapid deployment of a national telecommunications network.

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122 See, e.g., Oconomowoc Residential Programs, Inc. v. Milwaukee, 300 F.3d 775, 781-83 (7th Cir. 2002) (requiring municipality to grant zoning variance to accommodate group homes for the disabled); Innovative Health Sys., Inc. v. White Plains, 117 F.3d 37, 44 (2d Cir. 1997) (concluding that the ADA prohibits municipalities from discriminating against individuals on the basis of their disability when enacting and implementing zoning ordinances); see also supra notes 47-48.


124 The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2006) ("RLUIPA"), which requires courts to strictly scrutinize local land use decisions that substantially burden religious exercise, is arguably another, more blunt, example of Process Preemption. However, RLUIPA is a civil rights statute whose purpose differs significantly from the regulatory regimes analyzed in this Article. Thus, a full analysis of RLUIPA through the framework of Process Preemption will be saved for the future. For an overview of RLUIPA, see generally Adam J. Macleod, A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet, 42 Urb. L. Rev. 41 (2010); Ostrow, supra note 29.


126 See supra notes 21-22.
A. Preemption and Delegation in Radioactive Waste Facilities Siting

During the 1950s and 1960s, waste disposal facilities were sited in the same way as other forms of heavy industry. Companies considered a variety of factors, including proximity to markets and materials; availability of labor, transportation, utilities and infrastructure; and land and development costs.127 With little governmental oversight and little concern for environmental or geological factors, disposal facilities tended to be built close to industrial operations, often in or near cities, or else on wetlands and flood-plains, where land was less expensive.128

In the 1970s, however, increased public awareness of the health and safety risks posed by radioactive waste led to intense public opposition to the siting of disposal facilities.129 In response, the federal government adopted two diametrically opposed strategies for siting radioactive waste facilities: complete preemption of state and local control for siting high-level waste facilities, and complete delegation to the states for siting low-level waste facilities. Despite their differences, both approaches have failed to overcome local opposition to these land uses.

1. Unitary Preemption and High-Level Radioactive Waste

For national security reasons, the federal government has long asserted exclusive authority to manage high-level radioactive waste.130 The Atomic Energy Act of 1954131 and the Energy Reorganization Act of 1974132 granted the Nuclear Regulatory Commission (“NRC”) exclusive regulatory authority over high-level nuclear waste facilities.133 The statutes left no room for state participation, other than in an advisory capacity for certain transportation issues.134 Nonetheless, by the late 1970s, the states began to actively regulate, restrict, and even ban the shipment of highly toxic nuclear waste and the establishment of radioactive waste facilities within their borders.135

To resolve the jurisdictional conflict, Congress enacted the Nuclear Waste Policy Act of 1982 (“NWPA”).136 The Act was intended to “establish a schedule for the siting, construction, and operation of repositories” to protect the public and the environment “from the hazards posed by high-level radioactive waste.”137

127 Gerrard, supra note 17, at 1091.
128 Id.
129 Id. at 1138.
130 Id. at 1165–66 (“For obvious reasons of national security, federal primacy in the disposal of radioactive waste is well established.”).
133 42 U.S.C § 2011; 42 U.S.C. § 5801; see also Kearney, supra note 8, at 59 (noting that the Atomic Energy Act of 1954 organized federal-state relations in a hierarchical “layer-cake” model, in which the federal government regulated all phases of the nuclear fuel cycle).
134 Kearney & Garey, supra note 16, at 18.
135 Id.
radioactive waste.”137 The NWPA required the Secretary of Energy to nominate five sites for a high-level radioactive waste repository and to recommend three of them to the President for further study by January 1, 1985.138 The Act further required the Secretary of Energy to develop guidelines by which to evaluate potential repository sites.139

The NWPA also allowed any designated state to veto its selection, subject to an override by a majority vote of both houses of Congress.140 Not surprisingly, little progress was made in selecting a site, as each Department of Energy (“DOE”) proposal was strenuously opposed by state and local officials.141 In 1987, Congress amended the NWPA and expressly designated Yucca Mountain, federally owned land in Nevada, as the single national disposal site for all high-level radioactive waste.142 Though Congress formally approved the location in 2002, the opening of the site was continuously delayed by public opposition, legal challenges, and environmental studies.143

In 2009, more than two decades after the NWPA was enacted and billions of dollars spent studying and constructing the facility, the DOE announced that the Yucca Mountain site was no longer a viable option for storing high-level waste.144 In early 2010, the DOE formally initiated a termination action by filing a motion with the NRC seeking to withdraw its Yucca Mountain license application.145 In response, South Carolina, concerned that it would become a primary target for a new high-level radioactive waste site, filed suit to enjoin the DOE from abandoning the Yucca Mountain site.146 A panel of administrative law judges at the NRC ruled that the NWPA prevents the DOE from terminating its license application.147

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137 Id. § 10131(b).
138 Id. § 10132(b).
139 Id. § 10132(a).
140 Id. § 10135(c).
141 Kearney, supra note 8, at 59 (noting that “political gridlock quickly ensued as vehemently opposed state officials and citizens rejected various DOE proposals”).
142 42 U.S.C. § 10101; Kearney, supra note 8, at 60.
143 Adams, supra note 12, at 432, 438 (describing delays caused by scientific and environmental studies and judicial and administrative challenges); Kearney, supra note 8, at 60 (describing contentious siting process at Yucca Mountain).
145 Motion to Withdraw of U.S. Dep’t of Energy, supra note 144, at 1.
146 Brief of Petitioner-Appellant, South Carolina v. U.S. Dep’t of Energy, No. 10-1229, 2010 WL 978771, at *6 (4th Cir. Feb. 26, 2010) (South Carolina complains that “[t]he abandonment of the Yucca Mountain site would place South Carolina back on the list of candidate states for a high-level nuclear waste or spent fuel storage or disposal facility of some kind.”).
In the meantime, nuclear waste continues to be stored where it is generated, at over eighty commercial and DOE nuclear facilities located in thirty-five states.\textsuperscript{148} Facility managers must actively manage the nuclear waste by continually isolating, confining, and monitoring it to keep humans and the environment safe.\textsuperscript{149}

In conjunction with the termination of Yucca Mountain, President Obama established a Blue Ribbon Commission on America’s Nuclear Future that is charged with conducting a comprehensive review of policies for managing the disposal of high-level waste.\textsuperscript{150} Despite the ongoing work of the Blue Ribbon Commission, the United States is no closer to siting a high-level radioactive waste repository than it was before the NWPA was enacted over twenty years ago. Yet the need for a viable solution is even more pressing now as the DOE’s renewed interest in nuclear power as an alternative to fossil fuel\textsuperscript{151} and the ongoing nuclear crisis in Japan\textsuperscript{152} promise to thrust the siting of nuclear facilities into the national spotlight once again.

2. \textit{State Autonomy and Low-Level Radioactive Waste}

In contrast to Congress’s preemptive approach to high-level waste siting, Congress expressly delegated siting authority for low-level waste disposal facilities to the states. The LLW Act of 1980 and the 1985 Amendments represented a significant break from the prior scheme, in which the federal government asserted exclusive authority over radioactive waste management.\textsuperscript{153} The new policy was hailed for devolving power to the states, freeing the national government from the day-to-day responsibility of LLW management, and granting states the power to exercise their constitutional authority over land use regulation and the protection of public health and safety.\textsuperscript{154}

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{148} GAO Nuclear Waste, \textit{supra} note 12, at 1.
    \item \textsuperscript{149} Id. at 8.
    \item \textsuperscript{154} Id. at 210.
\end{itemize}
\end{footnotesize}
Despite this early optimism, the LLW policy has also failed in its goal of siting additional LLW disposal facilities.

a. The National Low-Level Waste Disposal Crisis

Between 1962 and 1971, six commercial low-level radioactive waste facilities were opened in the United States with little public awareness or opposition.\textsuperscript{155} Between 1975 and 1978, three of these sites were permanently closed, either because they were full or due to environmental contamination.\textsuperscript{156} As the public became increasingly aware of the health and environmental risks posed by hazardous waste facilities, public opposition to facilities' siting grew.\textsuperscript{157} As a result, local communities began relying on the land use regulatory process to prevent the siting of such undesirable land uses.\textsuperscript{158}

In 1979, two of the remaining three LLW facilities—Richland, Washington and Beatty, Nevada—were forced to shut down temporarily in response to reports of improper handling of LLW.\textsuperscript{159} The closures left Barnwell, South Carolina as the only operating LLW facility in the country.\textsuperscript{160} The governor of South Carolina, fearing that his state would have to take on the entire nation’s low-level radioactive waste, ordered a fifty percent reduction in the quantity of waste accepted at the Barnwell site.\textsuperscript{161} Feeling similarly overburdened, the governors of Washington and Nevada soon threatened to shut their sites permanently.\textsuperscript{162}

The governors of all three host states testified before Congress, proposing a national LLW policy that would require states to manage the disposal of their own waste and encourage states to form interstate compacts to fulfill their responsibilities.\textsuperscript{163} The governors’ view, later endorsed by the National

\textsuperscript{155} New York v. United States, 505 U.S. 144, 150 (1994) (listing sites at Beatty, Nevada (1962), Maxey Flats, Kentucky (1963), West Valley, New York (1963), Hanford, Washington (1965), Sheffield, Illinois (1967), and Barnwell, South Carolina (1971)); see also Daniel Tarlock, Benjamin Davy’s Essential Injustice: A Comparative and Philosophical Analysis of the LULU Siting Mess, 22 HARv. ENVT.L. REV. 607, 612 (1998) (“Until the 1980s, the location of a hazardous waste or nuclear facility was simply another exercise of local land use authority: host communities paid little attention to the issue, and even welcomed power plants and dumps.”).

\textsuperscript{156} New York, 505 U.S. at 150; Barry G. Rabe et al., NIMBY and Maybe: Conflict and Cooperation in the Siting of Low Level Radioactive Waste Disposal Facilities in the United States and Canada, 24 ENVT.L. 68, 75 (1994) (describing closure of Maxey Flats and West Valley disposal sites due to leaking radioactive materials).

\textsuperscript{157} Gerrard, supra note 17, at 1052; Rabe et al., supra note 156, at 76; Tarlock, supra note 155, at 610–14 (describing the rise of local opposition to facilities siting).


\textsuperscript{159} New York, 505 U.S. at 150.

\textsuperscript{160} Id.

\textsuperscript{161} Id.

\textsuperscript{162} Id.; Kearney, supra note 8, at 60 (noting that “the governors of the three remaining LLW host states met in 1979 and agreed that the burden had become onerous”).

\textsuperscript{163} Kearney, supra note 8, at 60.
Governors’ Association ("NGA"), treated LLW disposal as a land use issue, traditionally within the scope of state and local authority, rather than a national security issue, properly within the purview of the federal government. Congress adopted these suggestions in the LLW Act, which declared a federal policy of holding each state responsible for disposing of its own LLW and authorized states to enter into regional waste disposal compacts. The LLW Act required each compact region to develop a siting plan containing “detailed procedures and a schedule for establishing a facility location and preparing a facility license application.” Under the Act, the sited states would be authorized to refuse to accept waste generated outside of their regional compacts beginning in 1986. At the time, the state-based approach “received bipartisan support in Congress and among the nation’s governors, and was hailed as a unique example of congressional responsiveness to the desires of the states.” Commentators believed that the LLW Act would succeed because the states, now exclusively responsible for siting the facilities, had strongly supported the legislation.

b. Incentives for Compliance: Carrots and Sticks

Despite their support for the legislation, states remained reluctant to site waste facilities within their own borders. Moreover, the LLW Act did not impose penalties on states that failed to comply with the plan. As a result, little progress was made in siting additional LLW facilities. In 1985, Con-

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164 New York, 505 U.S. at 190–91; Rabe et al., supra note 156, at 78.
165 See, e.g., Kearney & Stucker, supra note 153, at 216.
167 Id. § 2021e(e)(1)(B)(ii) (2006). Although the LLW Act delegated the siting process to the states, substantive requirements for site selection, licensing, and regulation continued to be set at the federal level by the Nuclear Regulatory Commission. See 10 C.F.R. §§ 61.40–61.44, 61.50 (2010).
168 42 U.S.C. § 2021d(a) (repealed 1986) ("After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the region."); New York, 505 U.S. at 151 ("The 1980 Act authorized States to enter into regional compacts that, once ratified by Congress, would have the authority beginning in 1986 to restrict the use of their disposal facilities to waste generated within member States.").
169 Rabe et al., supra note 156, at 78.
170 See, e.g., Newberry, supra note 153, at 216.
172 New York, 505 U.S. at 151.
173 Id.; 131 Cong. Rec. 34,809 (1985) (statement of Sen. Bradley (D-N.J.)) ("The failure to achieve the intended result of the 1980 act can be largely attributed to the act’s lack of clearly defined incentives and penalties that would induce the establishment of new disposal capacity within the non-sited compact regions."); L. David Condon, The Never Ending Story: Low-Level Waste and the Exclusionary Authority of Non-Compacting States, 30 Nat. Re-
gress amended the LLW Act, providing incentives to site additional facilities
and imposing penalties on states that failed to do so.174 The amendments
embodied a compromise between the three states with LLW facilities and the
rest of the country, whereby the sited states agreed to continue to accept
LLW from other states for an additional seven years, and the unsited states
agreed to establish alternative disposal facilities in that time.175

Notably, the LLW Amendments did not preempt state and local laws
that prevented the siting of such LLW facilities. Rather,

[f]ederal legislation gave considerable freedom to individual
states and compacts in designing their own siting procedures.
Once Congress formally approved compacts, local siting authori-
ties devised their own methods of site selection . . . . As long as
state and compact siting strategies did not violate related federal
laws, including the National Environmental Policy Act, states were
free to devise any siting strategy.176

In lieu of preemption, the LLW Amendments provided three types of
incentives to pressure states to meet their obligation to dispose of waste gen-
erated within their borders.177 First, the Act provided financial benefits to
states that met a series of siting deadlines.178 Second, the Act imposed in-
creased disposal charges on states that missed the interim deadlines and also
restricted their access to existing disposal sites.179 Third, and most impor-
tantly, the LLW Amendments required states that had not provided for dis-
posing of the LLW generated within their borders by 1993 to “take title” to
it, thereby assuming liability for any damage it caused.180

New York chose to comply with the Act by constructing a disposal
facility within its own borders.181 Although New York identified five poten-

SOURCES J. 65, 68 (1990) (explaining that the incentives for compelling states to site facilities
were insufficient).

175 Id. §§ 2021e(a), (c).
176 Rabe et al., supra note 156, at 81. Thus:

Federal law made the states responsible for disposal of low-level waste, but they did
not tell the states how to do the job. Except for the milestone framework in the 1985
law . . . . the states essentially were working from a blank slate.

Newberry, supra note 171, at 57.

177 New York, 505 U.S. at 152–54.
178 42 U.S.C. §§ 2021e(d)–(e) (establishing the interim siting deadlines and financial
awards for reaching certain milestones).
179 See 42 U.S.C. § 2021e(e) (imposing escalating surcharges on states that failed to meet
interim siting deadlines).
180 42 U.S.C. § 2021e(d)(2)(C); see also Ryan, supra note 17, at 34 (describing the “take-
title” provision as “the most severe penalty under the new plan, and that most expected to
motivate compliance”).
181 New York, 505 U.S. at 154.
tial sites, surrounding residents strongly opposed each choice. In 1990, having failed to make progress in siting a facility, New York challenged the constitutionality of the LLW Amendments. In New York v. United States, the Supreme Court famously invalidated the “take-title” provision as a violation of states’ rights under the Tenth Amendment, but upheld the balance of the statute.

In the nearly twenty years since the Supreme Court’s New York decision, virtually nothing has been done by the states or Congress to address the low-level radioactive waste disposal problem. Despite early optimism that a state-based approach would more effectively site regional LLW disposal facilities, not a single new facility has been built as part of the regional compacts authorized by the Act.

The nation is still served by just three LLW disposal facilities, only one of which will accept LLW generated outside of its regional compact. After reopening and closing several times, Nevada closed the Beatty site permanently in 1992. Since the Beatty site closed, one existing hazardous waste facility in Clive, Utah was licensed to accept the least hazardous type of LLW. The Richland, Washington site remains open, but only accepts waste from states within its regional compact. The Barnwell, South Carolina site continued to accept nationwide waste until July 1, 2008, when it exercised

182 Id.; see also Sam Howe Verhovek, Nuclear Dump Plan Ignites Rural Protests, N.Y. TIMES, Sept. 19, 1989, at B1 (describing the locations chosen and local opposition to the sites).
183 New York, 505 U.S. at 154.
184 Id. at 145.
185 Ryan, supra note 17, at 50–55 (describing the aftermath of New York and noting that “[n]either Congress nor the states have meaningfully wrestled with the resulting regulatory ‘hot potato’ since then, each side seeming to conclude from their loss in court that the status quo is really the other’s problem.”).
186 See Low-Level Waste Disposal, supra note 18 (“Most states have entered into compacts; however, no new disposal facilities have been built since the Act was passed.”); see also Gerrard, supra note 17, at 1082–83 (describing several failed attempts to site LLW facilities following New York); Kearney, supra note 8, at 63 (describing the “turmoil” in state siting efforts); Mostaghel, supra note 158, at 400–02 (describing Michigan’s stalling tactics after being designated a host state by its regional compact).
188 See Richard R. Zuercher, Nevada Accord Closes Beatty LLW Facility Permanently, NUCLEONICS Wk., Nov. 11, 1993, at 6; see also Squeeze on Wastes, CHEMICAL Wk., Apr. 12, 1978, at 21 (commenting on the tense relations between Nevada, Washington, and South Carolina over site closures).
189 GAO LOW-LEVEL WASTE, supra note 18, at 31 (providing overview of Clive site); Ledoux & Cade, supra note 18, at 3; Locations of Low-Level Waste Disposal Facilities, supra note 187.
190 GAO LOW-LEVEL WASTE, supra note 18, at 35 (providing an overview of Richland site); Ryan, supra note 17, at 53.
its authority under the LLW Act to refuse to accept shipments of waste from outside its regional compact.\textsuperscript{191}

LLW that is not accepted at one of the three existing facilities is stored primarily at the site where it was produced, such as hospitals, research facilities, clinics and nuclear power plants.\textsuperscript{192} Particularly since the events of September 11, 2001, the on-site storage of radioactive material—even relatively less hazardous LLW—raises national security concerns.\textsuperscript{193} Thus, the LLW Act’s state-based approach to a national siting problem failed to achieve its ultimate goal of ensuring the safe, nationwide disposal of LLW as states, plagued by local opposition, refused to meet their voluntarily assumed compact obligations.

**B. Process Preemption: Federal-Local Interaction in Telecommunications Siting**

The Supreme Court’s decision in *New York v. United States* prompted scholars and policy experts to analyze the failed federal siting efforts.\textsuperscript{194} At around that same time, Congress began to consider comprehensive national telecommunications legislation designed to accelerate “private sector deployment of advanced telecommunications and information technologies.”\textsuperscript{195} Unlike the all-or-nothing approach of the Waste Siting Policies, the TCA’s Telecommunications Siting Policy utilizes a mix of regulatory actors to balance national communication goals with legitimate local siting concerns.\textsuperscript{196}

Prior to the passage of the TCA, telecommunications siting was hindered by inconsistent local permitting requirements\textsuperscript{197} and strong local opposition to cell phone towers.\textsuperscript{198} To address these obstacles, Congress initially

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\textsuperscript{191} Ryan, supra note 17, at 51; see, e.g., Judy Fahys, *Industry Recipe: Diluted N-Waste*, SALT LAKE TRIB., June 28, 2008 (reporting on the closure of Barnwell to all but three other states as of July 2008).

\textsuperscript{192} GAO LOW-LEVEL WASTE, supra note 18, at 20–21 (describing on-site storage options); Radioactive Waste, Production, Storage, Disposal, U.S. NUCLEAR REGULATORY COMM’N, http://www.nrc.gov/reading-rm/doc-collections/nuregs/brochures/br0216/ (last updated Nov. 3, 2010) (noting that LLW not accepted at one of the three disposal sites is stored on-site).

\textsuperscript{193} GAO LOW-LEVEL WASTE, supra note 18, at 21.

\textsuperscript{194} See, e.g., Gerrard, supra note 17, at 1050; Rabe et al., supra note 156, at 80; see also Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 FORDHAM URB. L.J. 787, 802–08 (1994); Jeffrey Wagner, *That Was Then and This Is Now: An Economist’s Wish List for the LLRW Siting Paradigm*, 38 NAT. RESOURCES J. 635, 635 (1998).


\textsuperscript{196} Salkin & Ostrow, supra note 53, at 1088; see also Weiser, supra note 42, at 1739 (discussing cooperative federalism in the context of the TCA).

\textsuperscript{197} See supra note 111–112 and accompanying text.

\textsuperscript{198} Salkin & Ostrow, supra note 53, at 1088 (describing NIMBY opposition to telecommunications towers); see also Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L. REV. 445, 455–57 (2005) (describing NIMBY opposition to cell tower siting); David W. Hughes, *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. CORP. L. 469, 483 (1998) (noting that NIMBYs bring serious challenges to the industry “[b]ecause the wireless industry must receive permission from local zoning boards to build
considered a proposal that would have granted nearly exclusive siting authority over telecommunications towers to a federal agency. The House "Facilities Siting Policies" called for the Federal Communications Commission ("FCC") to establish a negotiated rulemaking committee to develop substantive policies related to wireless facilities siting considering both the national interest in enhancing coverage and the legitimate interests of state and local governments in regulating the use of land within their own borders.

In contrast to the House Bill's complete federal preemption of local zoning, the corresponding Senate Bill did not address telecommunications siting at all. The House-Senate conference committee ultimately adopted a more modest policy that left primary siting responsibility with local authorities, but placed several federal limitations on the siting process. According to the conference committee report "The Conference agreement creates a new § 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in limited circumstances set forth in the conference agreement." Substantively, the Telecommunications Siting Policy advances the federal goal of establishing a nationwide telecommunications infrastructure by preventing localities from "unreasonably discriminat[ing] among providers of functionally equivalent services" and

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200 In developing such national siting policies, the committee was to consider:

(i) the desirability of enhancing the coverage and quality of commercial mobile services and fostering competition in the provision of such services; (ii) the legitimate interests of State and local governments in matters of exclusively local concern; (iii) the effect of State and local regulation of facilities siting on interstate commerce; and

(iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities . . . .

201 See generally S. 652, 104th Cong. (1995) (making no mention of telecommunications siting); Petersburg Cellular P'ship v. Bd. of Sup'rs of Nottoway County, 205 F.3d 688, 697–98 (4th Cir. 2000) (noting difference between the House version, which would have empowered the FCC to directly regulate the siting of towers, and the Senate version, which would have allowed local zoning officials to retain that authority).
202 H.R. Rep No. 104-458, at 207–08 (1996) (Conf. Rep.). As others have noted, the distinction between process and substance is sometimes blurred. See Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (including plaintiff's substantive interests as one factor to be weighed in determining the amount of process required to satisfy constitutional due process requirements); Thurman Arnold, The Role of Substantive Law and Procedure in the Legal Process, 45 Harv. L. Rev. 617, 643 (1932) ("The difference between procedure and substantive law is a movable dividing line which may be placed wherever an objective examination of our judicial institutions indicates is necessary."); Robert G. Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy, 87 Geo. L.J. 887, 900–01, 910–14 (1999) (describing the substance-procedure connection and noting that choice of procedure both reflects substantive values and impacts substantive outcomes).
from "prohibiting the provision of personal wireless services." The Telecommunications Siting Policy also prohibits the regulation of wireless facilities based on the "environmental effects of radio frequency emissions to the extent that such facilities comply with [FCC] regulations."

Procedurally, the Telecommunications Siting Policy requires local governments to respond to any request for authorization to place or construct a cell phone tower "within a reasonable period of time . . . taking into account the nature and scope of such request." It further requires that the local government response "be in writing and supported by substantial evidence contained in a written record." In addition, the Telecommunications Siting Policy creates a judicial right of action, allowing persons aggrieved under the act to take their claims to federal court, and requiring the court to hear and decide the claim on an expedited basis.

These federal standards preempt conflicting or inconsistent state and local regulations, but do not otherwise preempt state regulation of cell tower siting. Instead, like other cooperative federalist statutes, within the confines of the Telecommunications Siting Policy states remain free to experiment with tower siting and tailor policies to local conditions and preferences. North Carolina, for example, supplements the federal Telecommunications Siting Policy with its own statewide statutory scheme that seeks to curb practices that have prevented wireless coverage expansion in the state.

Since the passage of the TCA, courts have worked to balance the twin aims of the Telecommunications Siting Policy, weighing the federal interest in deploying a national telecommunications network against the desire to preserve state and local control over land use matters. As the First Circuit

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205 Id. § 332(c)(7)(B)(iv).
206 Id. § 332(c)(7)(B)(ii).
207 Id. § 332(c)(7)(B)(iii).
208 See id. § 332(c)(7)(B)(v).
209 See id. § 332(c)(3)(A); see also supra note 6.
210 The TCA explicitly states that "[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A); see also Robert B. Foster & Mitchell A. Carrel, Patchwork Quilts, Bumblebees, and Scales: Cellular Networks and Land Use Under the Telecommunications Act of 1996, 36 URB. L. W. 399, 399–400 (2004) (explaining that the TCA "does not completely preempt local zoning authority" but rather places restrictions on local discretion in the context of telecommunications facilities).
211 Salkin & Ostrow, supra note 53, at 1088.
212 See generally Wireless Telecommunications Facilities Act, 2007 N.C. Sess. Laws 1692 (codified at N.C. GEN. STAT. §§ 160A-400.50–53 (2007)) (setting time limits within which local government must respond to request to site a cell tower, requiring reasonable permit fees, and limiting review of request to public safety and zoning concerns).
213 U.S. Cellular Corp. v. City of Wichita Falls, 364 F.3d 250, 253 (5th Cir. 2004) (observing that the Telecommunications Act balances national and local concerns); see also ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002) (describing twin aims of Siting Policy); Foster & Carrel, supra note 210, at 399 (same).
observed, "The statute's balance of local autonomy subject to federal limitations does not offer a single 'cookie cutter' solution for diverse local situations . . . Congress conceived that this course would produce . . . individual solutions best adapted to the needs and desires of particular communities."214

In contrast to the Waste Siting Policies, the Telecommunications Siting Policy's Process Preemption regime has largely succeeded in accomplishing federal land use goals.215 In fact, since the Policy was enacted the number of cell towers has dramatically increased, significantly contributing to the rapid deployment of a national telecommunications network.216 Given the success of the Telecommunications Siting Policy, the next Part seeks to develop a theory of Process Preemption and assess its potential to inform future federal siting regimes.

V. A Theory of Process Preemption

In most industrialized countries the siting of locally undesirable facilities, ranging from prisons to municipal landfills, to group homes for recovering addicts, and especially hazardous and nuclear waste disposal plants, engenders intense public opposition. Such opposition often leads to drawn out permitting processes, extended environmental studies, legal challenges, and in many cases, abandonment of the proposed facility.217 Over the past few decades, regulators have experimented with a variety of siting techniques aimed at overcoming local opposition to these land uses, beginning with approaches that focused on technical site screening and selection, moving to strategies that involved negotiating with and compensating host communities, and, most recently, to processes that emphasize voluntary siting.218 These innovations have increased public acceptance—and siting success—

214 Town of Amherst v. Omnipoint Commc'ns Enters., Inc., 173 F.3d 9, 17 (1st Cir. 1999).
215 See supra notes 21-22 and accompanying text.
217 Joanne Linnerooth-Bayer, Fair Siting Strategies for Hazardous Waste Facilities, in Managing Conflict in Facility Siting: An International Comparison 36 (S.H. Lesbiere and D. Shaw, eds., 2005); Munton, supra note 8, at 1, 9-10 (describing national and international NIMBY opposition to wide range of facilities); Rabe et al., supra note 156 (comparing the American experience of low-level radioactive waste disposal siting to the Canadian experience); Laurie C. Malkin, Comment, Troubles at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers, 144 U. Pa. L. Rev. 759 (1995) (describing public response to siting group homes for recovering substance abusers).
218 Roger E. Kasperson, Siting Hazardous Facilities: Searching for Effective Institutions and Processes, in Managing Conflict in Facility Siting, supra note 217, at 13, 20-23 (describing voluntary siting techniques); Munton, supra note 8, at 10-23 (summarizing progression of siting strategies including "Decide, Announce, Defend," preemption, public partic-
for certain facilities, such as solid waste treatment plants and prisons, but have failed to increase successful siting of more controversial hazardous and radioactive waste facilities.\textsuperscript{219}

Given its incredibly complex nature, with political, social, economic and legal dimensions, a full analysis of the factors that impact siting success is beyond the scope of this Article.\textsuperscript{220} Moreover, this Article does not propose a generic siting strategy suitable for all federal regulatory programs. Instead, this Article identifies two innovations of the Telecommunications Siting Policy's Process Preemption regime relative to prior federal siting regimes and evaluates the potential for Process Preemption to aid in future federal land use policies, including those involving hazardous waste facilities.

In particular, this Part argues that Process Preemption has the potential to contribute to a national siting program by (a) accounting for the interjurisdictional nature of a federal land use policy and (b) imposing procedural constraints on the local land use decisionmaking process.

Section A argues that one failure of the Waste Siting Policies was its binary, dual federalist approach to waste facilities siting, which empowered the federal government to site high-level waste facilities and state governments to site low-level waste facilities. In contrast, Process Preemption accounts for the interjurisdictional dynamic by involving both federal and local regulators in the siting scheme.\textsuperscript{221}

Section B argues that the procedural constraints imposed by Process Preemption, including the requirement that decisions be made within a reasonable period of time, supported by substantial evidence contained in a written record and subject to expedited federal judicial review, facilitate national land use goals by increasing the consistency and transparency of the local decision-making process and allowing for more effective judicial review of zoning decisions.

Section C recognizes the limitations of Process Preemption as well as its potential to further national land use priorities. Specifically, Process Pre-

\textsuperscript{219} Linnerooth-Bayer, supra note 217, at 36; see also Been, supra note 194, at 800–08 (detailing unsuccessful efforts to implement compensated siting for low-level radioactive waste).

\textsuperscript{220} See, e.g., Linnerooth-Bayer, supra note 217, at 36 (listing elements common to successful siting regimes, including: (1) widespread agreement that the facility is needed to address a long-term problem; (2) that the facility must not impose unacceptable health and safety risks; (3) that the community must be involved in the siting process; and (4) that the siting process and outcome must be perceived as fair); Munton, supra note 8, at 2–3 (explaining that NIMBY opposition to siting stems from a combination of factors including the problems of providing public goods, local perception that facility siting process is undemocratic, concerns over health and safety, and concerns about fairness and equity).

\textsuperscript{221} Town of Amherst v. Omnipoint Commc'ns Enters., Inc., 173 F.3d 9, 17 (1st Cir. 1999) (describing the Telecommunications Siting Policy as a "refreshing experiment in federalism" and stating that "[t]he statute's balance of local autonomy subject to federal limitations" enables solutions tailored for diverse local situations).
emption seems well suited to facilitate nationwide siting of renewable energy facilities, such as wind turbines and solar installations. In addition, although Process Preemption is unlikely to overcome entrenched local opposition to siting centralized radioactive waste disposal facilities, it could play a role in a reformulated national strategy emphasizing local storage of radioactive waste.

A. An Interjurisdictional Approach

A number of federal statutes that implicate local land use policies seem to have recognized the crucial role that federal-local interaction plays in successful implementation of the federal scheme. For example, the Coastal Zone Management Act of 1972 ("CZMA"), enacted in response to growing concern regarding pollution of the nation's coastline, establishes a federal policy that requires states to work with local governments to manage the state coastline. In particular, the CZMA requires states to create an effective mechanism for continuing consultation and coordination between a designated state management agency and local governments within the coastal zone "to assure the full participation of those local governments and agencies" in implementing the Act. In addition, if the management agency administering the state program makes a decision that conflicts with local

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222 Recently, several scholars have advocated for increased federal regulation of renewable energy siting to promote national renewable energy goals; Process Preemption provides a model through which to channel federal intervention. See, e.g., Bronin, supra note 24, at 550 (arguing that to overcome state and local obstacles, Congress should require states to consider model standards for alternative energy microgrids); Garrick B. Pursley & Hannah J. Wiseman, Local Energy, 60 EMORY L.J. (forthcoming Mar.-Apr. 2011) (arguing for the adoption of a federal regulatory floor for the construction and physical location of distributed renewable devices, such as wind turbines and rooftop solar panels); Salkin & Ostrow, supra note 53, at 1091-97 (arguing for the enactment of a federal wind siting policy).


225 SALKIN, supra note 28, § 3:3 ("The Act was a response to a growing concern that the nation's coasts were becoming polluted due to the 'piecemeal development of coastal ecosystems without an overall strategy for comprehensive coastal management.'") (citing 118 CONG. REC. 14,170-71 (1972) (statement of Sen. Hollings(D-S.C.))).

226 16 U.S.C. § 1455(d)(1). See also, SALKIN, supra note 28, § 3.3 ("The drafters of CZMA recognized that for the Act to be successful, it needed to be implemented at the local level, given that significant land use controls are adopted and administered by municipalities.").

law, the agency must send notice to the local government and allow a 30-day comment period.\textsuperscript{228}

In contrast, the federal Waste Siting Policies' dual federalism approach fundamentally misses the interjurisdictional nature of the radioactive waste-siting problem. The NWPA assumed that siting a high-level hazardous waste facility was purely a federal matter, and therefore adopted an aggressively preemptive approach that entirely excluded participation by state and local regulators.\textsuperscript{229} In contrast, the LLW Act adopted the view endorsed by the National Governors' Association, treating LLW management primarily as a land use issue, within the realm of traditional state authority.\textsuperscript{230}

In reality, of course, radioactive waste siting implicates land use law, a fundamental local concern, as well as a variety of federal concerns, including energy production, national security, and interstate commerce.\textsuperscript{231} Federal siting regimes thus present a classic interjurisdictional regulatory problem that cannot be effectively remedied by a regulatory regime that exclusively empowers one level of government. Neither the federal government nor the state governments acting alone have the capacity to implement federal siting policies.\textsuperscript{232}

As the Yucca Mountain debacle demonstrates, notwithstanding the federal government's formal legal authority to preempt local zoning regulations, the federal government cannot simply preempt local political authority and force an unwanted facility on a resistant community.\textsuperscript{233} In his testimony before the Blue Ribbon Commission on Nuclear Energy, John Gervers, a consultant to the Clark County Nuclear Waste Division, noted that "the key lesson to be learned from the Nevada experience is that public acceptance of a siting process is an essential ingredient for success of any nuclear waste storage or disposal system."\textsuperscript{234} Indeed, siting conflicts throughout the country and internationally confirm that unilateral preemption of the siting pro-

\textsuperscript{228} Id. § 1455(d)(3)(B).
\textsuperscript{229} See supra notes 136-143.
\textsuperscript{230} Kearney, supra note 8, at 60; Rabe et al., supra note 156, at 78; see also supra notes 163-166 (noting that adoption of LLW Act recognized LLW siting as primarily a matter of state and local concern).
\textsuperscript{231} See supra notes 130-134 (describing federal interest in radioactive waste management).
\textsuperscript{232} Engel, supra note 73, at 159 (arguing that the static allocation of regulatory authority to either the state or federal government obstructs good environmental management, and that broadly overlapping state and federal regulatory jurisdiction is needed); Ryan, supra note 7, at 573 (noting that de jure interjurisdictional problems arise when neither side has all of the jurisdiction needed to effectively solve the problem).
\textsuperscript{233} See supra Part IV.A.1.
cess almost always fails and may even increase opposition to future siting efforts. As Michael Gerrard wrote in the early 1990s:

One clear lesson of the past two decades is that adamant, sustained citizen opposition, when backed by local government, almost always wins. Most importantly, it shows that the widespread practice of trying to preempt local control and force disposal facilities on unwilling communities is much like the medieval practice of bleeding the sick: it is exquisitely counterproductive. Not only does it never work, it actually increases opposition exponentially by turning what might be a voluntary risk into an involuntary, highly intrusive risk.

Instead, to gain local cooperation, the local community must be involved in the siting process, and local residents must feel that their concerns have been addressed.

At the same time, siting regimes that exclusively empower the states, and by extension local governments, to site (or refuse to site) waste facilities similarly lack the jurisdictional mechanisms needed to be effective. As Part II explains, “local” land use creates a paradox. On the one hand, “local” land use is desirable, as a theoretical matter, and necessary, as a functional matter, because locally elected officials are in the best position to assess local development needs and respond to local community concerns. Yet, as the NIMBY phenomenon vividly demonstrates, local land use decisions have effects that extend far beyond municipal borders. In the absence of countervailing federal or state policy there is no mechanism through which to compel local decisionmakers to consider regional or federal interests in the decisionmaking process. As a result, locally elected officials are generally unwilling to force undesirable land uses on hostile communities, even in the face of recognized national or regional need.

In contrast, Process Preemption accounts for the interjurisdictional nature of federal siting regimes. The Telecommunications Siting Policy establishes a regulatory framework that leaves primary siting authority in the hands of local regulators, but places explicit substantive and procedural con-

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235 Bingham & Miller, supra note 8, at 477 (explaining that "[s]imply preemting local controls ... is unlikely to resolve the siting dilemma because it does not address the causes of opposition"); Munton, supra note 8, at 12 (noting that states can strip local officials of permitting power, but not political power to oppose siting decisions).

236 Gerrard, supra note 17, at 1152.

237 Id. at 1137, 1152.

238 Id. at 1153-64; Gervers, supra note 234, at 2 (noting that “failure to acknowledge community concerns can lead to political resistance and public demonstrations”); Linnerooth-Bayer, supra note 217, at 36 (emphasizing importance of community involvement); Munton, supra note 8, at 2 (noting that NIMBY opposition arises, in part, because the community feels excluded from the democratic process).

239 See supra notes 40-46 and accompanying text.

240 See supra notes 49-58 and accompanying text.

241 See Fischel, supra note 52, at 881, 884-85; Kearney, supra note 8, at 63.
straints on the decision-making process. The substantive constraints, which preempt local ordinances that "unreasonably discriminate among providers of functionally equivalent services,"242 "prohibit the provision of personal wireless services,"243 or vary from FCC regulations governing radio frequency emissions,244 promote national interests by establishing baseline standards for telecommunications siting decisions. The procedural constraints, discussed more fully in the next Section, create an express mechanism through which to effectuate the substantive policy goals.

Process Preemption thus creates an antidote to the political process failure that sets in when local communities are exclusively empowered to regulate land use.245 By imposing federal constraints on the local zoning process, Process Preemption creates a legal mechanism that forces local officials to look beyond their own borders and consider national priorities in local land use decisions. At the same time, like the CZMA and other cooperative regimes, the Telecommunications Siting Policy is sensitive to local preferences and permits local governments to tailor the implementation of the policy to local geographical, social, and economic conditions.246

B. The Promise of Process

In addition to its interjurisdictional approach, a second crucial innovation of the Telecommunications Siting Policy, relative to other siting regimes, is its emphasis on local procedural safeguards. The Standard State Zoning Enabling Act247 adopted by most states in the early part of the 20th century failed to establish uniform local procedures for administering zoning regulations.248 As a result, procedural protections in the zoning process vary widely across jurisdictions. For example, though most jurisdictions require that some form of notice be given to impacted landowners,249 the form of

243 Id.
244 Id. § 332(c)(7)(B)(iv).
245 Nolon, supra note 55, at 16.
246 In addition, others have noted that the Telecommunications Siting Policy’s interjurisdictional approach encourages cooperation, rather than hostility, between land use developers and zoning officials. According to John Nagle:

The combination of local authority constrained by federal law has encouraged municipal zoning officials to identify those places in their community where cell phone towers would produce the least aesthetic harms, rather than trying to ban such towers altogether . . . . The TCA also encourages cellular providers to research the propriety of possible sites for a new cell phone tower rather than simply choosing a site and then trying to force local officials to approve it.

Nagle, supra note 22, at 564.
247 ADVISORY COMM. ON ZONING, supra note 35.
249 SALKIN, supra note 28, § 40:1 (summarizing notice requirements); 8 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 51.04 (Mar. 2007) (explaining that state enabling
notice required ranges from public notice in the form of a newspaper advertisement or posting on the property to mailed notice within a specified radius of the affected property.\textsuperscript{250}

Moreover, board hearings may be so informal as to cast doubt on the legitimacy of the proceedings; witnesses are rarely subpoenaed and frequently are not placed under oath; cross-examination is uncommon; and the rules of evidence do not apply.\textsuperscript{251} Edward Sullivan, who led an American Bar Association task force charged with developing fair procedures for the enactment and administration of land use regulations, criticized the local decisionmaking process for leaving applicants "in the midst of multiple layered hearings, facing inadequate procedures before local boards and commissions that were not always competent to handle decision making in a discretionary environment."\textsuperscript{252}

Indeed, commentators concerned about the apparent ad hoc, discretionary nature of local land use decisionmaking have often argued for procedural reforms as one way to check local discretion.\textsuperscript{253} In 2008 the American Bar Association task force responded by promulgating a Model Statute on Local Land Use Processes ("ABA Model Code") intended to establish uniform and fair procedures for land use decision-making.\textsuperscript{254}

The Telecommunications Siting Policy similarly imposes procedural safeguards by requiring that siting decisions be (1) made within a reasonable period of time; (2) supported by substantial evidence contained in a written record; and (3) subject to expedited federal judicial review.\textsuperscript{255} The overall impact of these procedural constraints is to increase the transparency and consistency of the local siting process and facilitate judicial review of individual siting decisions. Moreover, procedural protections can enhance the

\textsuperscript{250}SALKIN, supra note 28, § 40:1.  
\textsuperscript{251}Id.; Daniel R. Mandelker, Model Legislation For Land Use Decisions, 35 URB. LAW. 635, 639 (2003) (describing decision-making under the SZEA as "chaotic" and noting that "[h]earings are undisciplined with no real attempt at a fair process that includes necessary procedural safeguards.").
\textsuperscript{253}Mark Cordes, Policing Bias and Conflicts of Interest in Zoning Decisionmaking, 65 N.D. L. REV. 161, 169 (1989) ("Recognizing the entrenchment of zoning flexibility and to some degree ad hoc decisionmaking, commentators have argued that more attention needs to be paid to the manner and process by which such decisions are made."): Mandelker, supra note 251, at 636 n.5 (arguing for reform "to provide a decision making process in which administrative relief is routine and final decisions are required within a reasonable time.").
\textsuperscript{255}47 U.S.C. § 332(c)(7)(B).
public's perception of fairness in the decisionmaking process, increasing
public acceptance of the ultimate result.256

1. Decisions Within a Reasonable Time

Zoning boards confronted with controversial or unpopular proposals
often have an incentive to postpone making a decision either in the hopes
that substantial delay will increase costs for the developer and encourage
abandonment of the project,257 or in order to extract concessions from the
developer.258 As others have noted, long delays in the zoning process call the
motives of regulators into question and undermine the legitimacy of the final
decision.259

Accordingly, the recently adopted ABA Model Code sets time limits
within which land use decisions must be made and requires the zoning board
to refund application fees if these deadlines are missed.260 The comments
explain:

[I]t is one of the fundamental elements of due process that a deci-
sion maker must come to a final decision within a reasonable pe-
riod of time. Certainty is one of the goals of the land-use decisionmaking process . . . and a failure by a local government to
decide either way on a development permit application destroys
certainty.261

256 See Jessica Mantel, Procedural Safeguards for Agency Guidance: A Source of Legiti-
macy for the Administrative State, 61 ADMIN. L. REV. 343, 377-79 (2009) (citing studies that
"found that individuals’ judgments about the fairness of the government’s decision-making
process, rather than the decisions themselves, dominate how individuals generalize from their
own experience to their overarching views on the legitimacy of government authorities"); Glen Staszewski, Reason-Giving and Accountability, 93 MINN. L. REV. 1253, 1278 (2009)
(notating that “reason-giving fosters democratic legitimacy because it both embodies, and pro-
mides the preconditions for, a deliberative democracy that seeks to achieve consensus on ways
of promoting the public good”).

257 ABA MODEL CODE, supra note 254, § 210 (noting that in the absence of monetary
consequence “a dilatory local government would have a strong incentive to do nothing with a
controversial permit application”); see also Snyder-Westerlind Corp. v. Mayor of Atl. High-
may fail in order to discourage an applicant or because “an application presents a politi-
cally unpopular atmosphere”); Humble Oil & Ref. Co. v. Borough of E. Lansdowne, 227 A.2d
664, 666 (Pa. 1967) (noting that “a Board could effectively prevent the erection of needed
structures through the simple process of luxurious lolling while spiders of inattention spin
webs of indifference over pending public problems”).

258 Cordes, supra note 253, at 167 (noting that “delayed and flexible decision-making also
provides municipalities with significant leverage over potential development in order to obtain
developer concessions”).

259 Eagle, supra note 198, at 493.

260 ABA MODEL CODE, supra note 254, § 210.

261 Id. § 210 cmt.
A number of jurisdictions similarly require that zoning decisions be made within a reasonable period of time. Such limitations are designed to expedite the board's decision and to provide the applicant with speedy notice of the status of his application.

The Telecommunications Siting Policy requires local governments to act on telecommunications siting requests within a reasonable time "taking into account the nature and scope of such request." The legislative history indicates that in requiring that zoning decisions be made within a "reasonable" time, Congress did not intend "to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision [sic]."

Still, the reasonableness requirement prevents zoning boards from stalling by providing a basis for applicants to challenge indefinite, unjustified permitting delays. Courts have held that local authorities failed to act within a reasonable period of time when they have unnecessarily kept applicants "tied up in the hearing process through invocation of state procedures, moratoria, or gimmicks." At the same time, requiring decisions within a "reasonable" time does not compel local authorities to forgo a thorough investigation of the proposed application. Instead, Congress chose a relatively flexible "reasonable" time requirement to allow local authorities to consider the particular merits of each application.

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263 See Miles v. Foley, 752 A.2d 503, 508 (Conn. 2000); see also Carolyn W. Poulin, Comment, Land Use Applications Not Acted Upon Shall Be Deemed Approved: A Weighing of the Interests, 57 UMKC L. Rev. 607, 614 (1989) (discussing the purposes of deemed approval statutes).


265 H.R. Rep. No. 104-458, at 208 (1996) (Conf. Rep.); see also N.Y. SMSA Ltd. P'ship v. Riverhead Town Bd., 118 F. Supp. 2d 333, 341 (E.D.N.Y. 2000), aff'd, 45 F. App'x 24 (2d Cir. 2002) (finding that the term "reasonable" was used to allow zoning boards flexibility in the amount of time they have to consider each application given the nature of the request).

266 Masterpage Commc'ns, Inc. v. Town of Olive, N.Y., 418 F. Supp. 2d 66, 77 (N.D.N.Y. 2005) (internal citations omitted); see also USCOC of Greater Missouri, LLC v. City of Ferguson, Mo., No. 4:07-CV-1489(JCH), 2007 WL 4218978, at *5 (E.D. Mo. Nov. 29, 2007) (internal citations omitted) (warning that local authorities should not transform the application process into a "self-perpetuating, endless odyssey").

267 See, e.g., N.Y. SMSA Ltd. P'ship v. Town of Riverhead, 45 F. App'x. 24, 27 (2d Cir. 2002) (explaining that the "reasonable time" requirement includes time required to comply with state environmental review); Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996) (indicating that a moratorium on siting is permitted if required to evaluate applications and gather information).

268 N.Y. SMSA Ltd. P'ship, 118 F. Supp. 2d at 341 (finding that "the term 'reasonable' was no doubt used to allow local authorities the flexibility to consider each application on its individual merit" and that "what is reasonable will necessarily depend upon the nature and scope of each request.").
Of course, Congress could have assured even more timely decision-making by including an express time limit, for example a requirement that denials of telecommunications siting permits be made within 60 or 180 days. Establishing an explicit time frame at the outset of the regulatory policy, however, would have risked locking in a suboptimal regulatory choice. Instead, the relatively flexible "reasonable" time limit allowed the FCC and local decisionmakers to gain practical experience and expertise in siting telecommunications facilities without fear of a ticking clock.

On the basis of this experience, in November 2009, after more than a decade administering the Telecommunications Siting Policy and reviewing siting decisions, the FCC issued a declaratory ruling to provide guidance on the time frame that would be considered "reasonable" under the statute. Under the FCC ruling, zoning boards must respond to requests for co-location within ninety days and requests for new tower construction within 150 days. According to the FCC, the ruling "achieves a balance by defining reasonable and achievable timeframes for State and local governments to act on zoning applications while not dictating any substantive outcome on any particular case or otherwise limiting State and local governments' fundamental authority over local land use." The FCC's significant practical experience administering the Telecommunications Siting Policy under a flexible reasonable time standard increases the likelihood that its ultimate ruling fairly balances national telecommunications priorities and local siting concerns.

2. Decisions Supported by Substantial Evidence Contained in a Written Record

a. Written Record

Given the informal nature of proceedings before a zoning board, it is not surprising that boards often fail to create adequate records of zoning

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269 See supra notes 96–98 and accompanying text.

270 Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 F.C.C.R. 13,994, 14,010 (Nov. 18, 2009) [hereinafter Declaratory Ruling]; see also Robert B. Foster, The Better Part of Valor Is Co-Location: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities Under the Telecommunications Act of 1996, 42 URB. L. 595, 601 (2010) (noting that "the FCC set these deadlines based on the actual practice it saw in the record, with evidence that co-location applications require less time than standalone tower applications").

271 Declaratory Ruling, supra note 270, at 14,010. Failure to make a ruling within these time periods creates a rebuttable presumption of unreasonableness. Id.


273 Foster, supra note 270, at 602; Weiser, supra note 42, at 1702–03.
hearings.\textsuperscript{274} Zoning determinations frequently lack clear findings of fact and fail to explain the basis upon which the decision was made.\textsuperscript{275} As a result, a reviewing court may not have the information necessary to serve as a meaningful check on local discretion.\textsuperscript{276}

Recognizing the problem created by inadequate record keeping and ambiguous decision-making, the ABA Model Code requires that decisions on land use permits be based upon and accompanied by a written statement containing, among other things: (1) the facts relied upon in making the decision; (2) the regulations relevant to the decision; (3) responses to all related issues raised by the parties during the hearing; and (4) any other conditions that must be satisfied before a certificate of compliance can be issued.\textsuperscript{277} The Telecommunications Siting Policy similarly addresses this procedural shortcoming by requiring that denials of telecommunications siting applications be in writing and supported by substantial evidence contained in a written record.\textsuperscript{278}

The effect of both the ABA Model Code and the Telecommunications Siting Policy’s writing requirements is to increase the transparency of the zoning process. Transparency allows concerned parties, including developers, surrounding property owners, public officials and members of the community to understand governmental decisions, to detect improper motives, and to hold decisionmakers accountable.\textsuperscript{279} A publicly available record of zoning decisions imposes a check on the zoning process by allowing applicants and, significantly, courts to compare the results of similar applications to detect inconsistent or arbitrary results. Thus, a writing requirement and looming threat of constituent and judicial review create an incentive for zoning boards to exercise principled discretion. In addition, requiring zoning boards to support their decisions in writing likely promotes more deliberative and rational decisionmaking, leading to better substantive results.\textsuperscript{280}

\textsuperscript{274} SALKIN, supra note 28, § 40:1 (noting that in many zoning hearings records are indifferently kept).

\textsuperscript{275} Id. ("The decision itself may be so deficient in findings and so ambiguous as to its rationale, that a reviewing court may have difficulty in determining what was decided and on what basis.").

\textsuperscript{276} See id. § 40:44 ("If the court’s power to correct clear abuses of discretion is to be effectively exercised, the findings must disclose the facts upon which the board’s determination rests.").

\textsuperscript{277} ABA MODEL CODE, supra note 254, at § 204(4); see also id. § 204(4) cmt. ("To avoid confusion about what has been decided, a reasoned decision based on findings of fact is an essential conclusion to the permit review process.").


\textsuperscript{279} See Bressman, supra note 98, at 506; Staszewski, supra note 256, at 1278–84 (arguing that public officials in a democracy can be held accountable by a requirement or expectation that they give reasoned explanations for their decisions).

\textsuperscript{280} See Marvin E. Frankel, Lawlessness in Sentencing, 41 U. Chi. L. Rev. 1, 9 (1972) ("The giving of reasons helps the decision-maker himself in the effort to be fair and rational, and makes it possible for others to judge whether he has succeeded."); Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633, 657–58 (1995) (noting that "the very time required to give reasons may reduce excess haste and thus produce better decisions" and that a "reason-giving mandate will also drive out illegitimate reasons when they are the only plausible expla-
Though the TCA’s writing requirement imposes a procedural safeguard on the zoning process, its failure to set out in more detail what must be contained in the writing has led to much litigation.\textsuperscript{281} For example, the Sixth Circuit, adopting a standard first enunciated by the First Circuit,\textsuperscript{282} has held that “a governmental unit’s decision must (1) be separate from the written record, (2) describe the reasons for the denial, and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons.”\textsuperscript{283} In contrast, other courts accept less extensive writings, including the minutes of the meeting at which the decision was made or a letter conveying the decision.\textsuperscript{284}

As with the reasonableness requirement described above, however, the relatively vague writing requirement contained in the original statute has allowed regulators time to gain experience siting telecommunications facilities and courts time to gain experience reviewing these decisions. At this point, it may be appropriate for the FCC or Congress to issue guidance on the writing requirement. In particular, if the goal of the writing requirement is to increase the transparency and ultimate acceptability of siting decisions as well as to facilitate judicial review, then the more fulsome standards of the Sixth Circuit’s interpretation of the TCA’s writing requirement or the ABA Model Code’s standard should be adopted. Nevertheless, the very fact of imposing a writing requirement adds a vital procedural check on telecommunications siting decisions, helping to insert the federal interest into the local decisionmaking process.

\textit{b. Substantial Evidence}

In addition to the writing requirement, the Telecommunications Siting Policy creates a judicial check on the local zoning process by requiring telecommunications decisions to be supported by a higher degree of evidence than is traditionally required to uphold local zoning decisions. Judicial re-
view of local land use decisions is notoriously deferential. In its landmark decision of *Village of Euclid v. Ambler Realty Co.*, the Supreme Court held that a zoning ordinance violates due process only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." State courts generally accord local zoning decisions a presumption of validity and refuse to overturn them unless they are arbitrary, capricious, or unreasonable. Federal courts apply an even more deferential "shocks the conscience" standard to local administrative acts.

In contrast, the Telecommunications Siting Policy requires that all decisions to deny a wireless service facility's siting request be "supported by substantial evidence contained in a written record." Although the term "substantial evidence" is not defined in the statute, Congress indicated that courts should employ "the traditional standard used for judicial review of agency actions." Generally, courts have interpreted this standard to require "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The "substantial evidence" standard is less deferential to local decision-makers than the traditional standards of judicial review in land use cases. In *Cellular Telephone Co. v. Town of Oyster Bay*, the Second Circuit explained the impact of the substantial evidence requirement as follows:

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287 See, e.g., City of Lilburn v. Sanchez, 491 S.E.2d 353, 355 (Ga. 1997) (holding that under the rational basis test "any plausible or arguable reason that supports an ordinance will satisfy substantive due process"); Bradley v. Payson City Corp., 70 P.3d 47, 50 (Utah 2003) (stating that zoning amendment decisions are upheld unless "arbitrary and capricious or otherwise illegal"); Prete v. City of Morgantown, 456 S.E.2d 498, 500 (W. Va. 1995) (upholding zoning ordinances so long as not arbitrary and capricious). Even Planning Commission decisions that are not affirmed by the local legislative body are accorded legislative deference. See, e.g., Harris v. Zoning Comm'n of New Milford, 788 A.2d 1239, 1251 (Conn. 2002) (upholding zoning commission decisions unless they are "clearly contrary to law" or there was an "abuse of discretion"); Markland v. Jasper Cnty. Planning & Dev. Dep't., 829 N.E.2d 92, 96 (Ind. Ct. App. 2005) (same); Auger v. Town of Stafford, 931 A.2d 1213, 1216 (N.H. 2007) (applying deferential reasonableness standard for review of planning board decisions).

288 See, e.g., Natale v. Town of Ridgefield, 170 F.3d 258, 262–63 (2d Cir. 1999); Anderson v. Douglas County, 4 F.3d 574, 577 (8th Cir. 1993) (using a "truly irrational" standard).


291 Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 1999); see also Preferred Sites, LLC v. Troup Cnty., 296 F.3d 1210, 1218 (11th Cir. 2002); Sw. Bell Mobile Sys., Inc. v. Todd, 244 F.3d 51, 58 (1st Cir. 2001); Telespectrum, Inc. v. Pub. Serv. Comm'n of Ky., 227 F.3d 414, 423 (6th Cir. 2000); Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp., 181 F.3d 403, 408 (3d Cir. 1999). In contrast, the Fourth Circuit has adopted a "reasonable legislator" standard that gives great weight to public opinion in evaluating whether a permit denial is supported by "substantial evidence." AT&T Wireless PCS, Inc. v. City Council of Va. Beach, 155 F.3d 423, 430 (4th Cir. 1998).
Traditionally, the federal courts have taken an extremely deferential stance in reviewing local zoning decisions, limiting the scope of inquiry to the constitutionality of the zoning decision under a standard of rational review. Although Congress explicitly preserved local zoning authority in all other respects over the siting of wireless facilities, the method by which siting decisions are made is now subject to judicial oversight. Therefore, "denials subject to the TCA are reviewed by this court more closely than standard local zoning decisions."292

Though the substantial evidence standard is less deferential than the arbitrary and capricious standard of review, it does not substitute local judgments with those of the judiciary.293 Instead, the substantial evidence standard is keyed to the localities' own zoning code.294 The Telecommunications Siting Policy sets out the degree of evidence needed to support the zoning decision, but the decision itself is to be made in compliance with substantive state and local law.295

In T-Mobile Central, LLC v. Unified Gov't of Wyandotte County/Kansas, for example, the city denied T-Mobile's siting request in part because T-Mobile failed to demonstrate that a denial would prohibit the provision of wireless service.296 Both parties agreed that T-Mobile met the minimum criteria set out in the zoning code, which included set-back requirements and landscaping requirements, among other things, but did not require applicants to demonstrate that a denial would prohibit the provision of wireless service.297 The Tenth Circuit held that the city did not base its decision on sub-

292 Cellular Tel. Co. (Oyster Bay), 166 F.3d at 493 (emphasis added) (citations omitted); see also Preferred Sites, LLC, 296 F.3d at 1218 (finding that "substantial evidence" standard "requires courts to take a harder look than when reviewing under the arbitrary and capricious standard"); BellSouth Mobility, Inc. v. Parish of Plaquemines, 40 F. Supp. 2d 372, 377 (E.D. La. 1999) (noting that "substantial evidence" standard of review is more strict than usual "arbitrary and capricious" standard).

293 T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty/Kansas City, 546 F.3d 1299, 1307 (10th Cir. 2008) (internal citations omitted) ("While a reviewing court has no power to substitute its own conclusions for those of the fact-finder . . . if the record as a whole contains conflicting evidence, the fact-finder must adequately explain its reasons for rejecting or discrediting competent evidence . . . .").

294 USCOC of Greater Mo. v. City of Ferguson, 583 F.3d 1035, 1042 (8th Cir. 2009); T-Mobile Cent., LLC, 546 F.3d at 1307; U.S. Cellular Tel., LLC v. City of Broken Arrow, 340 F.3d 1122, 1133 (10th Cir. 2003); New Par v. City of Saginaw, 301 F.3d 390, 398 (6th Cir. 2002); Town of Amherst v. Omnipoint Commc'n Enters., 173 F.3d 9, 14 (1st Cir. 1999).

295 Eagle, supra note 198, at 477 (noting that "federal law specifies the degree or quantum of evidence needed to legitimize, under federal law, the exercise of legislative powers devolved upon local boards, under state law, to enforce substantive rights established by state law"); see also Martin, supra note 125, at 433–34 (citing cases holding that substantial evidence must be based on existing state and local law).

296 546 F.3d at 1307–08.

297 Id. at 1303 n.2, 1307–08.
stantial evidence because the city "invent[ed] a criterion" not required by the local zoning ordinance. 298

Critics of the substantial evidence standard worry that it will privilege formal fact finding and prevent boards from properly considering local opinions and concerns over aesthetics and property values, which are not easily reducible to empirical data.299 However, courts have generally taken a more practical approach, upholding permit denials based on aesthetic concerns even when not supported by declines in market value, so long as the objections are tied to the particular tower and not to cell phone towers generally or a misunderstanding of what the tower would actually look like.300 For example, the Eleventh Circuit has held that although "citizens' generalized concerns about aesthetics are insufficient to constitute substantial evidence . . . [a]esthetic concerns may be a valid basis for denial of a permit if substantial evidence of the visual impact of [a] tower" is presented.301 Thus, the TCA's substantial evidence requirement imposes a heightened judicial check on local siting decisions while deferring to substantive state and local zoning regulations.

3. Federal Judicial Review

The federal judiciary has long resisted hearing land use cases, imposing numerous procedural barriers to block access to the federal courts.302 As a result, land use disputes are typically heard in state court. The Telecommunications Siting Policy creates a federal judicial right of action, allowing persons aggrieved under the Act to take their claims to federal court and requiring the court to hear and decide the claim on an "expedited basis."303 In so doing, the TCA provides a federal forum for land use cases involving telecommunications siting, signaling the national implications of telecommunications siting decisions.

298 Id. at 1307–08.
300 Eagle, supra note 198, at 478–79; see also T-Mobile Cent., LLC, 546 F.3d at 1312 (holding that "[m]ere generalized concerns regarding aesthetics are insufficient to constitute the substantial evidence justifying the denial of an application to construct a wireless telecommunications facility").
301 Preferred Sites, LLC v. Troup County, 296 F.3d 1210, 1219 (11th Cir. 2002).
302 STEVEN H. STEINGLASS, I SECTION 1983 LITIGATION IN STATE COURTS § 6:16 (2010) (noting that "federal courts are often reluctant to hear zoning and other land use cases and have relied on abstention, preclusion, and their discretion to refuse to exercise pendent jurisdiction to limit access to federal court in § 1983 land use cases" (citations omitted)); Gregory Overstreet, The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases, 10 J. LAND USE & ENVTL. L. 91, 92 (1994) (demonstrating that the procedural ripeness doctrine effectively excludes land use cases from federal court); Fischel, supra note 28, § 5 (noting that the Supreme Court has imposed numerous procedural barriers to access to the federal courts).
Moreover, in contrast to federal judges who are appointed, and—once confirmed by the Senate—enjoy life tenure, most state judges are elected by the local population and serve for terms, rather than for life.\textsuperscript{304} Some studies have concluded that elected judges are more sensitive to local pressures and public opinion than federal judges.\textsuperscript{305} Particularly in the context of NIMBY disputes, federal judges, who are presumably insulated from local politics, may be able to approach siting conflicts from a more national perspective.

\section*{C. The Future of Federal Process Preemption}

With its emphasis on procedural safeguards and its innovative interjurisdictional approach, Process Preemption has the potential to facilitate siting a variety of nationally significant land uses, including renewable energy structures and small-scale radioactive waste storage facilities.

\subsection*{1. Renewable Energy Siting}

A majority of states have already adopted mandatory Renewable Portfolio Standards that require increasing percentages of electricity sold by utilities within each state to be produced from renewable sources, including wind.\textsuperscript{306} Congress has also been considering the adoption of a federal RPS that would require electric utilities to produce increasing percentages of their electricity from renewable sources, reaching approximately twenty-five percent by 2025.\textsuperscript{307}

Wind power, in particular, receives overwhelming public support in national surveys.\textsuperscript{308} Advocates note that the advantages of wind energy include: "(a) environmental benefits, such as reduced greenhouse gas emissions; (b)...

\footnotesize{\textsuperscript{304} Richard Briффault & Laurie Reynolds, State and Local Government Law 53 (West 6th ed. 2004); David E. Posen, The Irony of Judicial Elections, 108 COLUM. L. REV. 265, 266 (2008) (noting that "the majority of U.S. states have subjected at least some of their courts to popular elections; roughly ninety percent of state general jurisdiction judges are currently selected or retained this way"); James Sample, Court Reform Enters the Post-Caperton Era, 58 DRAKE L. REV. 787, 791 (2010) (noting "thirty-nine states in which judges face election").

\textsuperscript{305} Posen, supra note 304, at 271 ("Elected judges are less independent than appointed judges in the sense that the public can vote them out of office if it does not like their decisions."); Alexander Tabarrok & Eric Helland, Court Politics: The Political Economy of Tort Awards, 42 J.L. & Econ. 157, 186 (1999) (finding that elected judges are more likely to redistribute wealth from out-of-state businesses to in-state plaintiffs).


\textsuperscript{307} Davies, supra note 94, at 1341 (noting that over twenty-five proposals for a national RPS have been introduced in the federal legislature); Salkin & Ostrow, supra note 53, at 1051 (describing federal RPS proposals). See generally Joshua P. Fershee, Moving Power Forward: Creating A Forward-Looking Energy Policy Based on a National RPS, 42 CONN. L. REV. 1405 (2010) (discussing the benefits of implementing a national RPS, while indicating that supplemental energy legislation, including federal siting authority for transmission lines, is necessary to ensure that the goals of a national RPS will be achieved).

\textsuperscript{308} Salkin & Ostrow, supra note 53, at 1063–64 (citing polls).}
economic benefits, including price stability, job creation, and new sources of income for rural communities; and (c) national security benefits, achieved by reducing national reliance on foreign oil.\textsuperscript{309}

Despite national support, wind energy projects often face intense opposition at the local level.\textsuperscript{310} Indeed, the reaction of local communities has prompted one prominent energy siting consultant to remark that "wind energy is fast becoming 'the mother of all NIMBY wars.'"\textsuperscript{311} In contrast to hazardous waste facilities, however, local objections to wind turbine siting revolve less around unacceptable health and safety concerns, and more around standard development considerations, including concerns over aesthetic impacts; noise; negative impacts on property values, tourism, and recreational opportunities; negative environmental impacts caused by turbine construction; and negative impacts on birds, bats, and other wildlife.\textsuperscript{312}

A Process Preemption regime that is part of an overall federal renewable energy policy could greatly facilitate wind energy siting. As with telecommunications siting, a federal wind siting policy, or more broadly, renewable energy siting policy, would compel local governments to consider the extra-local impacts of their siting decisions without depriving local officials of their traditional land use regulatory authority.\textsuperscript{313} Moreover, Process Preemption would increase regulatory uniformity, facilitating the development of nation-wide renewable energy infrastructure, without unduly compromising the ability of local officials to respond to local conditions.\textsuperscript{314}

\textsuperscript{309}Id., at 1055–56.


\textsuperscript{311}Marty Durlin, Op-Ed., Wind Farms—Not in My Backyard, RUIDOSO NEWS (N.M.), Mar. 19, 2009, at A4 (statement of Bob Kahn, head of Strategic Communications, a Seattle-based firm that helps wind farms gain siting permits).

\textsuperscript{312}Martin, supra note 125, at 441–50 (describing local objections to wind siting); Salkin & Ostrow, supra note 53, at 1071–76 (assessing local concerns regarding wind turbine siting).

\textsuperscript{313}See generally Salkin & Ostrow, supra note 53 (proposing federal wind siting policy modeled on the Telecommunications Siting Policy).

\textsuperscript{314}Inconsistent local land use requirements increase the costs, and reduce the feasibility, of some renewable energy projects. See Bronin, supra note 24, at 571–72; Salkin & Ostrow, supra note 53, at 1086–87; see also, U.S. DEP’T OF ENERGY, 20% WIND ENERGY BY 2030: INCREASING WIND ENERGY’S CONTRIBUTION TO U.S. ELECTRICITY SUPPLY 119 (2008) (finding that "[i]ncreased uniformity of regulatory requirements across regions would greatly facilitate the increased deployment of wind projects necessary to reach [federal renewable energy goals]").
Although Process Preemption has succeeded in siting telecommunications facilities, this Article does not contend that Process Preemption alone would succeed in overcoming local opposition to siting waste disposal facilities. Critically, while cell phone towers raise significant health concerns, they do not generate the same fear and loathing as do hazardous waste facilities. According to Don Munton:

Hazardous waste facilities evoke extreme dread. Although cause and effect is impossible to pinpoint with scientific certainty, community residents suspect high rates of illness, rare cancers, miscarriages, birth defects, and deformities in live stock are caused by hazardous waste incinerator emissions or releases of toxic chemicals that migrate through the soil and contaminate nearby surface waters and groundwater aquifers.

Case studies suggest that it is difficult to overcome local opposition to facilities that are perceived to be unacceptably hazardous, as is the case with radioactive waste sites. In these cases, increased safety measures are unlikely to be viewed as making the facility safe enough. Moreover, offers of compensation at best have no effect, and may even have a negative effect on local acceptance of radioactive waste facilities. If residents believe a facil-

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316 Kearney, supra note 8, at 63; see Eileen Gauna, LNG Facility Siting and Environmental (In)justice: Is it Time for a National Siting Scheme?, 2 ENVTL. & ENERGY L. & POL’Y J. 85, 89 (2007); Gerrard, supra note 17, at 1137-38.  

317 Munton, supra note 8, at 1.  

318 Linnerooth-Bayer, supra note 217, at 36 (concluding that it is difficult to gain community approval for siting facilities that evoke perceptions of high risk); see also Lawrence S. Bacow & James R. Milkey, Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach, 6 HARV. ENVTL. L. REV. 265, 267-69 (1982) (describing the generally intense local opposition to hazardous waste facilities).  

319 Linnerooth-Bayer, supra note 217, at 36.  

ity is unacceptably hazardous, they will view compensation as a bribe and will oppose the facility no matter how great the compensation.\textsuperscript{321} Unless the public believes that radioactive waste can be safely disposed of, finding acceptable sites for radioactive waste facilities will continue to prove quite difficult, regardless of the federal constraints imposed on the siting process.

At the same time, a number of recent events—including the DOE's renewed interest in nuclear power, the closure of the Barnwell, South Carolina disposal facility to nationwide waste, the abandonment of the Yucca Mountain site, and the international concern regarding the ongoing nuclear crisis in Japan—create an urgent need for new solutions.

While some experts continue to search for more effective siting strategies in the context of radioactive waste,\textsuperscript{322} others have argued that the inability to site radioactive waste facilities should serve as a powerful incentive to reevaluate the technology and consider alternatives.\textsuperscript{323} Still others advocate abandoning the search for a centralized nuclear repository and adopting a strategy that utilizes above-ground dry container storage facilities dispersed throughout the country.\textsuperscript{324} The recently established Blue Ribbon Commission on America's Nuclear Future is charged with studying each of these possibilities, as well as with recommending legislation to aid in accomplishing federal goals.\textsuperscript{325}

Thus, the current siting stalemate could change if the national policy regarding radioactive waste disposal shifted from searching for large, centralized disposal facilities to smaller, more easily located, local storage facilities.\textsuperscript{326} In fact, local storage is the de facto method of radioactive waste disposal for at least thirty years beyond a reactor's life. GAO Nuclear Waste, supra note 12, at 10; see also Nuclear Wasteland, supra note 144. Indeed, the NRC has determined that these dry cask storage systems can safely store nuclear waste for at least thirty years beyond a reactor's life. GAO Nuclear Waste, supra note 12, at 10; see also Nuclear Wasteland, supra note 144.

\textsuperscript{321} Michael Gerrard, Whose Backyard, Whose Risk 126 (1994); Jenkins-Smith & Kunreuther, supra note 320, at 65; Munton, supra note 8, at 17. In contrast to radioactive waste facilities, empirical studies have demonstrated that compensation and other forms of community benefits are likely to increase the percentage of the local community willing to support other undesirable land uses, including prisons and land-fills. Jenkins-Smith & Kunreuther, supra note 320, at 63–65 (citing studies).

\textsuperscript{322} See, e.g., Daigee Shaw, Visions of the Future for Facilities Siting, in Managing Conflicts in Facility Siting: An International Comparison, supra note 217, at 196; Jenkins-Smith & Kunreuther, supra note 320, at 63; Kasterson, supra note 218, at 13. See, e.g., Michael Thompson, Unsuitability: What Should It Tell Us?, 7 RISK 169 (1996). In particular, Thompson advocates temporary above-ground storage as a way to solve short-term problems while giving policymakers time to develop a long-term solution. Id.

\textsuperscript{323} Indeed, the NRC has determined that these dry cask storage systems can safely store nuclear waste for at least thirty years beyond a reactor's life. GAO Nuclear Waste, supra note 12, at 10; see also Nuclear Wasteland, supra note 144.

\textsuperscript{324} Blue Ribbon Comm'n on America's Nuclear Future, supra note 150; see also GAO Nuclear Waste, supra note 12, at 22–29 (assessing the Yucca Mountain repository and proposing two alternative options, including centralized storage at two locations or continued on-site storage of nuclear waste); see also GAO Low-Level Waste, supra note 18, at 40–43 (evaluating alternative strategies for managing LLW).

\textsuperscript{325} See GAO Nuclear Waste, supra note 12, at 10 (describing potential for above-ground storage of waste); Munton, supra note 8, at 8–9 (describing trend away from permanent, large-scale plants to smaller, mobile units and alternative disposal technologies).
management in this country, as all high-level radioactive waste, and much low-level radioactive waste, is stored at the facility where it was produced.\footnote{327} Though the NRC policy favors disposal over storage, the NRC allows indefinite on-site storage of LLW.\footnote{328}

In contrast to centralized waste disposal facilities, small storage facilities, which potentially can be sited in any number of locations throughout a jurisdiction, are perhaps amenable to a Process Preemption regime. The success of Process Preemption in telecommunications siting, and its potential for success in wind energy siting, is likely due, in part, to the fact that cell phone towers and wind turbines are physically smaller and less obtrusive than waste disposal facilities.\footnote{329} Thus, local decisionmakers often have a real choice in deciding among the possible locations for a cell phone tower. On the other hand, within any jurisdiction there are likely to be only one or two viable locations for a large waste disposal facility, leaving unhappy regulators with even fewer siting choices.

Furthermore, any potential host community is likely to feel unfairly burdened in housing a large waste disposal facility designed to serve a much broader region.\footnote{330} In fact, the few states with LLW disposal facilities have expressed anger and frustration at being forced to accept a disproportionate share of the nation’s waste.\footnote{331} In contrast, cell phone towers are widely dispersed throughout the country,\footnote{332} distributing the burden of telecommunications siting more equitably among jurisdictions. Moreover, as the number of cell phone users has exploded over the last decade,\footnote{333} most citizens recognize the value of increasing the number of cell phone towers.\footnote{334}

The burden of

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\item GAO Nuclear Waste, supra note 12, at 36–40 (noting that all nuclear waste is currently stored on-site); GAO Low-Level Waste, supra note 18, at 20–21 (noting that low-level waste that is not accepted by one of the commercial disposal sites is stored on-site).
\item GAO Low-Level Waste, supra note 18, at 21.
\item For example, the LLW facility in Barnwell, South Carolina, is located on a 235 acre tract of land. Barnwell Facility, Energy Solutions, http://www.energysolutions.com/customer-portal/barnwell-facility (last visited Mar. 5, 2011). In contrast, cellular phone towers are usually mounted on top or on the side of existing structures, such as trees, water tanks, or tall buildings. See Cellular Phone Towers, supra note 315.
\item Kahan, supra note 320, at 87–89 (describing negative impact of compensation on siting efforts); Munton, supra note 8, at 3 (noting that concerns regarding distributional equity often underlie siting disputes).
\item Wireless providers must site an increasing number of cell towers in order to meet the consumer demand for personal communication systems. See Hughes, supra note 198, at 481. For a map depicting cell phone tower sites by state, see Cell Tower Location Maps Index, CellTowerInfo.com http://www.celltowerinfo.com/CellTowerLocationMapsIndex.htm (last visited Mar. 5, 2011).
\item See, e.g., Jack Encarnacao, Good Reception: Cell-Tower OK Looks Probable, Patriot Ledger, Aug. 18, 2005, at 13 (describing "a watershed change in attitudes about the necessity of cell towers" that has led to reduced public opposition to cell tower siting); Derrick Henry, Mixed Signals on Cellphone Towers, N.Y Times, Jan. 11, 2009, at CT1 (noting that "[c]ellphone towers have proliferated throughout New York City's suburbs in recent years,
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siting a cell phone tower is, therefore, balanced by the tangible benefits of increasing the quality and availability of local cell phone service.

Similarly, local storage facilities would more evenly distribute the burden of waste management across the country, rather than concentrating the costs of waste disposal on one or two host communities. In addition, it is possible that local communities would be more willing to accept the burden of locally produced wastes because, as with cell phone towers, they benefit from the activities that produced the waste in the form of higher paying jobs and sophisticated medical care at hospitals using radioactive medicine.

In this context, a federal Process Preemption framework would empower local officials to site small storage facilities, subject to national substantive and procedural constraints on the siting process. Substantive constraints might include preemption of local ordinances that ban such facilities from within the jurisdiction or that regulate the health and safety standards of such facilities, to the extent that the facilities comply with national standards set by the NRC.

Procedural constraints might require that local decisions be made within a reasonable period of time and be supported by substantial evidence contained in a written record and subject to expedited judicial review. In this way, Process Preemption could balance federal and local interests in radioactive waste facilities siting, furthering the national goal of safely disposing of radioactive waste without alienating local officials and generating insurmountable community opposition.

VI. Conclusion

Federal preemption of state autonomy is often controversial. It is even more so when federal preemption impacts land use, an area long deemed to be within the purview of local governments. This Article has examined three federal siting regimes, two relating to the siting of radioactive waste facilities and one concerning the siting of telecommunication towers, to illustrate the range of regulatory options available to Congress in crafting federal policy.

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often welcomed by municipalities and by residents who would benefit from the tens or hundreds of thousands of dollars a year that go into public coffers"; Leilani Albano, Los Angeles Residents Fight Back Against AT&T Cell Phone Tower, L.A. WEEKLY BLOGS (Oct. 12, 2010, 6:10 PM), http://blogs.laweekly.com/informer/2010/10/los_angeles_residents_fight_ba.php (noting that AT&T collected signatures from residents who supported the cell tower siting).

Kahan, supra note 320, at 88.

Though express federal preemption of local land use authority might appear, at first glance, to be the most effective method of siting nationally relevant facilities, such federal preemption has largely failed to accomplish federal goals. Experience convincingly demonstrates that sustained local opposition to a proposed land use is difficult to overcome through formal preemption of local authority. In addition, aggressive federal preemption is at odds with modern theories of cooperative federalism, which rely on multiple layers of government to achieve federal policy goals.

Complete federal delegation of siting authority to states, which in turn empower local governments to exercise this authority, has similarly failed to achieve federal siting goals. Regimes that exclusively empower local decisionmakers flounder because locally elected officials tend to focus exclusively on the well being of their own residents to the detriment of outsiders. In the absence of countervailing federal or state policy, there is no mechanism through which to compel local decisionmakers to consider regional or federal interests in their decisionmaking process.

In contrast to a regime that places siting authority entirely within one level of government, Process Preemption is an interjurisdictional approach that places federal substantive and procedural constraints on the local siting process. This Article demonstrates that Process Preemption’s innovative use of federal and local regulators, combined with its emphasis on procedural safeguards, effectively balances national and local land use priorities, and increases the legitimacy and public acceptance of controversial siting decisions.